FEDERATION AND WORLD ORDER

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by

DUNCAN & ELIZABETH WILSON

With a Preface by

C. E. M. JOAD, D.Litt.

Member of the Council,
Federal Union

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TO

CHARLES & KATHERINE FLEMING

Parentibus amicis

Wähntest du etwa,
Ich sollte das Leben hassen,
In Wusten fliehen,
Weil nicht alle Blütentraume reiften ?

GOETHE, *Prometheus.*

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AUTHORS' NOTE

This book can only be excused by the urgency of the matter which it treats. It was written in the months of July and August this year, often in the intervals of regular work; such revision as it could have received would have been given to it in the last week of August, a time which proved ill-suited to leisurely reflection. The most that can be hoped from such a hastily devised affair is that it will stimulate thought on its subject-matter, provoke disagreement, and invite improvement.

The authors' thanks are due most particularly to Mr. Charles Fleming for criticisms and improvements, and to Mr. Patrick Ransome and Mr. R. T. E. Latham for suggestions.

London, August 28, 1939.

PREFACE

By Dr. C. E. M. JOAD

WHEREIN is to be found the greatest enemy to the happiness of contemporary man? In poverty? Possibly. In pain? Perhaps. In the wickedness of the human heart? No doubt. But these are secular evils; they have oppressed men in all times; they are in no sense distinctive of our own. Laying stress upon the word "contemporary," I should look in a different direction and answer that it is in the Nation State. It is the unchecked power of the Nation State which for a generation has darkened the horizon of men's lives and today drives them to their destruction. The Nation State regards itself as sole arbiter of right and wrong, claims to be judge and jury in its own cause, acknowledges no law to govern its relations with other States and no morality in restraint of its designs upon its neighbours. Over the lives and liberties of its citizens it exercises an absolute control. It requires of them a willingness to kill other human beings whom they have never seen, whenever it deems the mass slaughter of the members of some other State to be desirable, and conceives that its welfare may be promoted by exacting from them the most horrible sacrifices, in order that they may harm the citizens of its alleged enemy.

It tramples upon the liberties of individuals in order to establish its independence. While proclaiming its determination to be free, it deprives its citizens of their freedom ; for, when the State goes to war, to preserve freedom, what man has a right to call his soul his own? It is the enemy of culture no less than of happiness, and that it may pursue its fancied interests, withholds from men the use of their own greatest gifts. On the day on which these lines were written I talked with a German refugee, a pianist of international reputation. He had been playing privately to a few of us after dinner and we were unanimous in declaring that we had rarely, if ever, heard better playing. He told us that when he was permitted to enter England, the condition was imposed that he should make no public display of his great talents. Instead of giving delight to the people of this country, he is now engaged in an obscure process involved in the manufacture of tobacco machines.

The State is an anachronism. With its trade restrictions and tariffs, its customs and its quotas, it sets up barriers between itself and its neighbours and seeks to the best of its ability to impede the manifest drive of our civilization towards unity. This drive is generated by a number of forces, chief among which is the abolition of distance. The abolition of distance is a strange new factor in human affairs whose long range effects are only now beginning to be realized. It is only 150 years ago that it took a man as long to travel from York to London as it now takes him

to fly from London to New York. The future holds in store advances no less remarkable than those of the past. To-day we can talk with one another from the ends of the earth ; in a few years we shall be able to talk face to face. To-day we can fly in the air ; to-morrow we shall fly in the stratosphere.

The changes in the range and scale and pace of living resulting from the abolition of distance are prodigious. Yet while the circumstances of our lives have changed beyond the imagination of our predecessors, our political structure has remained stationary. While the world has shrunk to the size of a continent, the boundaries of the Nation State have remained constant. The horse and foot mode of travel is outmoded, yet we still live in horse and foot communities. The world is economically a single whole, yet politically it is based upon the assumption that it is a congeries of economic self-sufficient national units.

The world, I repeat, is economically a single whole. It is like a vast echoing chamber in the sense that what happens in it anywhere reverberates everywhere. It is a world in which, whether we like it or not, we have become quite strictly members of one another. Across the surface of this world run the boundaries of the Nation States. Many of these were fixed in the distant past ; even the more modern date for the most part from the eighteenth century. Upon its stage strut the symbolic figures in whom their fictitious personalities are embodied, Britannia and the Fatherland, Marianne and Uncle Sam,

unaware that the foundations are shifting, that the supports are rotten, and that their convulsive movements, their agitated and pompous gesticulations, threaten to bring down the whole structure in ruins. For it is with nothing less than destruction that these national anachronisms threaten the civilization that tolerates them, the weapons with which science has endowed us having become too powerful to permit us any longer to indulge our natural mischievousness in war, except we be prepared to risk destruction. Either war must be superseded, or our civilization will perish.

Such in brief are the outlines of the picture of the contemporary world as many of us have come to see it. On the one side—the side of technology, economics, and common sense—is a manifest drive to unity; and on the other—the side of politics, pugnacity, and reaction—are the Nation States that impede and obstruct it: on the one hand, the revolution in living caused by the changes in our environment; on the other, the obsolete divisions of mankind which the State exists to perpetuate: on the one hand, the gradual shrinking in the size of the world; on the other, the Nation States whom the shrinking has squeezed so closely together that, unless they can be superseded before it is too late, they will grind one another to pieces. It is for these reasons that an increasing number of men and women have come to see in the unchecked power of the modern State the peculiar evil, in the need to curtail it before it destroys us, the distinctive

challenge of our times. How is that challenge to be met?

The obvious method is to devise some form of organization which, in respect of some at least of its functions, will supersede the Nation State just as the Nation State superseded the province, the department, and the canton. This is the germ of the idea which has come to be known as Federal Union. Can we not, we have asked ourselves, set up a common Federal Parliament for mankind which will be directly representative not of States, but of individual men and women, leaving to the Nation State the administration of those purely national affairs whose conduct does not threaten, because it does not affect, the nationals of other States? Looking for a model, on which to shape our designs, we turn inevitably to the existing Federal Parliaments which have a long record of successful administration behind them, and which in Switzerland and the United States have contrived to represent and to harmonize the diverse interests of members of different races.

Now here we are faced with a difficulty. We see the evils of Nationalism; we appreciate the need for Federation; we amuse ourselves by drawing up constitutions for a Federation of States and devising the basis of representation for a Federal Parliament. Clarence Streit has done these things to admiration. . . . But we are most of us woefully ignorant of the past history of the very form with which we would propose to experiment. We know that there have been

Federal systems in the past and that there are Federal systems in the present. But how have they functioned? How have they been formed? What has been the effect of the central Federal government upon the individual members of the Union? What are the danger points, and how can they be guarded against?

These are the questions which the authors answer for us and, in answering, fulfil a want of which those who are convinced of the need for Federalism have recently grown increasingly conscious.

Here is a factual study of the way in which Federation is actually working in the United States, in Canada, and in Australia. Here is also an analysis of the elements of undeveloped Federalism in the League of Nations. The Wilsons' study is sober, scholarly, and restrained —one feels a sort of wry admiration for a man who can say of our present situation: "it will hardly be denied" that it is "far from satisfactory"—it eschews theory and confines itself to giving us what we all want—the facts. For these reasons, I regard the present book as an important contribution to the growing literature of Federalism; and, as such, I heartily recommend it to those who very rightly demand to be assured that Federalism is not just another Utopian scheme, the product of wishful thinking, but a highly practicable experiment in the government of human communities which has already been tried on a number of occasions, and has admirably solved the problems which called it into being.

FEDERATION AND WORLD ORDER

CHAPTER I

FOREWORD

WE hear to-day from every quarter the call to National Service, and no one would dispute its urgency. Yet even the most fervent patriot must recognize that Nationalism, that is, exclusive and unyielding National spirit, is one of the root causes of the world's many troubles to-day. Two hundred years ago the division of country against country, or group against group of Powers, was more tolerable. Economically each country was far nearer to self-sufficiency than to-day; to the traveller or to the general, countries and continents were much farther separated in time from each other; and war, if disputes came to the arbitrament of war, was less devastating. The individual was not driven to think beyond the national system to any form of international organization.

To-day things are very different. The individual has the dangers of a clash between

nations more immediately present to his mind. In many countries, compulsory military service is a constant reminder; the threat of the air raid is by this time all-pervading; many industries, and even the private lives of many individuals, have to be organized for adaptation to either war or peace conditions; while the economic freedom of the individual is noticeably affected by the claims of national defence and the cost of armaments; and, not least, the sense of personal insecurity attendant constantly, if obscurely, upon the inhabitants of great cities influences all departments of their lives.

All this is unpleasant enough. But at the back of many minds must be the thought of the contrast which might be if the resources of modern civilization were only used for constructive, not destructive purposes. The increased speed and facility of communication, to take the most obvious instance, is at the moment deplorable to the man who may be bombed all the more certainly, and who is probably immobilized by that threat; but it is that very facility which has made the range of the individual in all senses potentially larger, and might make him a citizen of many countries besides his own.

Further, the energy of the nation is being largely spent in the attempt to preserve itself as it is, rather than in the attempt to better its conditions. The voluntary A.R.P. organizations are obviously necessary to ensure either peace or some kind of safety in time of war; but

equally clearly they absorb a great deal of effort which might otherwise be used in an attempt to ameliorate some of our more pressing social needs.

That our present situation is far from satisfactory will hardly be denied, and if we are not to merit the stigma of degeneracy which is too often applied to the British on the other side of the Atlantic, then every individual citizen should accept the challenge and make it his business to consider what he can contribute towards altering these conditions.

This book attempts to view a many-sided problem from one aspect only, and from an elementary standpoint. Its title, Federation and World Order, may suggest an unpractical, even Utopian, approach. The practical man may argue as follows: It is very well to speculate on some ultimate world order, but even if such an order could ever be realized, even if we ought at least to behave as if it could, are there not more immediate tasks to be tackled by the ordinary man and the politician? Should they busy themselves with thinking in the meantime about ultimate ends, when there are so many immediate objects to be secured?

This argument admittedly has force: unless our air defences are strengthened, to take the most obvious instance, we are liable to a knock-out blow that will effectively abolish our Utopias with ourselves. If, on the other hand, our air defences are strong, we can, even in the case of war, begin to calculate on a long-term basis,

and think seriously of what sort of settlement would be desirable at the end of hostilities.

Similarly, unless a solid "Peace Front" is built, which will collectively resist attacks on any member of it, Germany will probably be able to mop up, one by one, any countries that stand in the way of its expansionist programme. It seems very unlikely that any plans for world organization could enable us to dispense with these elementary steps of self-protection; only behind the bulwark of strong air defences and a strong Peace Front is any such planning for final international order possible.

So much may be granted readily to the practical man, and no one should be more glad than the Utopian speculator for the efforts made to attain these immediate ends. The contention here made, however, is that every one should look further than such immediate ends. Suppose, for instance, that our system of air defence were perfected, and our system of alliances watertight, we might indeed continue to enjoy peace; but it could hardly be considered a stable peace, since most of the elements which make for international grievances and wars would still be present. Peace should not be regarded as an absolute good, an end to be striven for in itself. Peace and war are rather symptoms of health or disease, and wherever all the causes of war may be present, even if without an actual war, the peace obtaining can hardly be called satisfactory.

Every one should therefore consider, so far as

his occupations admit, the causes *for* which we are re-arming ourselves and making alliances. It is easy enough to say what we are struggling *against*; that is the domination of Germany, and the Powers under its protection, which will become, if it is realized, universal domination. Whatever were the nature of the German Government, we would object to such an aim, and, as it is, we have further motives of national pride, because we feel Hitler has discredited us. What is really important, however, are the more reputable motives. His Government embodies many principles which are peculiarly distasteful to us, particularly the suppression of freedom of thought, as displayed in their censored Press and censored Art, and the negation of the value of the individual, as shown most clearly in their treatment of minorities and to some degree in their whole political system.

That is sufficient to fight against; but if we are to hope for any permanent victory we must know what we want to substitute for it. We must recognize that the German is not just an anti-christ who out of natural perversity does everything most likely to offend our moral sense; the German has at best an ideal for which he is fighting and for which he is willing to make considerable sacrifices, even if the ideal is only that of the supremacy of the German race. An ideal can only be effectively countered by another ideal. The struggle between Fascism and Communism may perhaps fairly be described as a struggle of ideologies; the struggle between

Fascism and the democracies, a struggle whose existence whether in peace or war it is now idle to deny, is not yet one of ideologies. And that is where Fascism has at present an immense advantage. It is up to the citizen of the democracies (or anti-Fascist bloc) to decide what he is going to fight for, not only what he is going to fight against. He may be willing to fight for his personal security or national interests or for democracy; but he should consider that these have not been very well preserved by the defeat of Germany in 1918, and the subsequent settlement of Versailles. The question must be faced: What sort of an international settlement would preserve them better?

These are the most obvious and to us the most fundamental objections against long-term planning to-day for world organization. But there are others more subtle and philosophic which deserve a brief consideration, as they are really more fundamental if less widespread.

The argument is sometimes presented that it is useless to talk of human progress in the light of past history: thousands of philosophers have tried to construct mentally their Utopias and to obtain their realization on earth. Yet we are not better human beings than, for instance, the Greek of fifth century Athens. It matters little what is done by individuals; the great cycle will find its own instruments and take its destined course.

Such a view appears to be profoundly apathizing. Faith in human progress is certainly harder

to achieve now than it was fifty years ago. But when one considers, not Europe but the human race, when one takes not fifth century Athens but Neanderthal man, as the point from which we have progressed, when one thinks of the path of progress, not as a uniform and pleasantly graded hill with a sharp incline upwards between 1840–90, but as a path which includes some steep downward slopes, such faith should not be impossible of achievement. If we cannot progress upwards, let us at least not plunge over a precipice; and let us take counsel to avoid such a disaster. As to the second point, it is indeed unlikely that modern speculators will succeed where the great ones of old have failed; to say that it is impossible, is to commit oneself to that form of historical determinism which we recognize most frequently in the speeches of Dr. Goebbels. Further, the speculator of to-day has one great advantage over his predecessors; the public to whom he can utter his ideas is much larger than before, it is in much more immediate danger from the present international disorganization than ever before, and it has resources which, developed peacefully, it knows might achieve the material foundations of a great civilization.

It would of course be idle to expect the immediate realization of any such aim. Even in the case of an armed struggle with the Fascist Powers who support the philosophy of Nationalism, no one can seriously hope that perfect world order would immediately follow their

defeat, as certain of the Puritans in 1642 expected the Kingdom of God in England to follow the defeat of the Royalist forces. The planning or contemplation of world order to-day may presuppose faith, but it must be based on common sense. It is obvious to all but the blindest enthusiast that the public, even in the non-Fascist countries, is not yet intelligently or even emotionally interested in the question of world order ; even if the statesmen at the head of affairs could agree on a solution, it is doubtful at present whether they could take the public with them. There is in fact urgent need of an intelligent public opinion with respect to world order ; and, further, there is a widespread will towards self-education in these matters : fear, if no other motive, is driving people to think internationally.

In the education of the public there should be two main subjects : first, the history of past attempts at international organization, with a view to discerning where they have failed and what is the heritage which we still have from them and may still use ; secondly, the ultimate aims towards which we should direct and co-ordinate such existing organizations as may still appear serviceable, and the type of world order which we hope to achieve. This book attempts to provide some historical data for the consideration of one type of possible world order, namely, an International Federation.

It may be asked why this one type of possible world order has been chosen for consideration.

The answer is twofold. First, an International Federation is the logical half-way house between international anarchy, tempered by alliances and leagues, and the kind of super-State which would completely obliterate the present division of Europe into nations. Secondly, the idea of International Federation has been presented recently in two very striking books, Mr. Curtis's *Commonwealth of God* and Mr. Streit's *Union Now*, which stimulated very wide public interest. In particular the introductory chapter of the latter book sets out most cogently and at considerable length the pernicious influence of Nationalism in international affairs to-day and the advantages to be derived by the individual from a Federation of Nations. These books will drive their readers to think out the possibilities of an International Federation. But they are essentially prophetic ; they deal largely with *a priori* arguments in favour of federalism, as in theory preferable to other forms of international organizations ; it is not their function to inform the ordinary reader about existing federations, their working problems, and the light which a study of these might throw on the application of Federalism to world organization.

This book is intended then as an introduction to those who wish to educate themselves in the problems of federal organization, and to consider how they may bear on future world order. The project of an International Federation has many and influential supporters : it cannot be dismissed as a mere Utopian speculation, and it

should not be grasped in blind desperation as a last, even if hopeless, refuge. Those who cling to the idea or reject it should do so for solid reasons ; and this is an attempt to show at least where solid reasons should be looked for.

The plan of the book is the following : first to consider briefly which, if any, of the organizing principles embodied in the League of Nations has held its own against the resurgence of Nationalism, and how far the constitution and procedure of the League is adapted to the furtherance of international order ; then to survey more fully the origins, constitutions, and working problems of three of the principal National Federations to-day—the United States of America, Canada, and Australia ; and finally to consider, in summary fashion, how far the merits of a National Federation and its difficulties would be reproduced, magnified, or diminished in an International Federation ; whether such a Federation would appear practicable or whether any partial Federation on the international scale would be preferable, on the basis of existing international organizations.

It is clear that such a task if thoroughly performed would be far beyond the scope of a short book and amateur historians. We would like therefore to stress the fact that this book is intended, for want of a better, to suggest possible lines of inquiry to the amateur, and to provide him with a few basic facts and ideas for discussion. No kind of world order could be permanent without an educated public opinion. Every

individual can help towards its formation by discussing ultimate aims with others, privately or in study-groups ; and if this book serves as a point of departure for any such discussions, it will have achieved its humble purpose.

Chapter II

THE LEAGUE OF NATIONS

I

It is clear that some knowledge of past attempts at international planning is necessary for the consideration of any immediate steps towards world order. The main emphasis of this book will be on national planning in the shape of national federations; but to see how far such planning could be paralleled on an international scale, some historical knowledge is needed. Excellent histories of the nineteenth century international organizations and of the origins of the League are already available; and on the political working and failures of the League itself there is no lack of literature,[1] to which this chapter does not attempt to add. It does little more than follow up and modify to the purposes of this study one of the lines of thought suggested by Sir Alfred Zimmern (see Bibliography), to whose book we are particularly indebted. He traces five streams of international planning to

[1] A useful summary of the composition, procedure, and achievements of the League will be found in *Essential Facts about the League of Nations*, Geneva, 1938 (one shilling). It contains the text of the Covenant, a study of which will probably clarify much in this chapter. For other sources, see Bibliography.

their convergence in the Covenant of the League, and then follows the course of the main stream thus formed; we cannot do better than to follow this classification.

The five streams may be labelled as follows:

1. Conference of the Powers. (Concert of Europe, League Council.)
2. The Guarantee System, regional or otherwise. (Monroe Doctrine.)
3. Inter-state Arbitration Systems. (Permanent Court of Arbitration.)
4. The Hue and Cry (mobilization of world-conscience against war).
5. Technical Organization (as culminating in the International Labour Office and some of the League's permanent committees—Economic, Transit, Health, etc.).

The first three lines of thought have an essential likeness. The systems founded on them seek not to remove the causes of international disputes, but to prevent such disputes spreading, or to provide machinery for their reconciliation. The fourth is of a rather different nature; the system founded on it is directed against one of the root causes of war, public apathy or indifference, but the machinery of the system is unlikely to have much effect on public opinion. The fifth line of thought, embodied in the International Labour Office and the League committees, is more constructive; it is directed to the consideration, at least, of some of the material

causes at the root of international grievances, rather than to the machinery for settling such grievances once they have arisen. It is therefore more important for the purpose of this book, and is treated rather more fully in the last section of this chapter.

II

The Conference system dates from the re-settlement of Europe after the Napoleonic wars at the Congress of Vienna. The Great Powers of Europe were anxious to organize a solid front against the liberal threat to established order, whose work they had seen in the French Revolution. Austria, Prussia, and Russia were the great champions of the established order on the Continent, and had they succeeded in making the British Foreign Secretaries, Castlereagh or Canning, give Britain's guarantee to the frontiers and constitution established at Vienna, the effective rule of Conservatism might have been set up throughout Europe, with power to intervene in the internal affairs of any of the Minor Powers. As it was, Castlereagh was not willing to do more than consult periodically with the continental Great Powers on European affairs, thus giving the " Concert of Europe " a definite meaning ; while Canning, who succeeded him in 1822, was not even willing to continue the system of regular conferences.

Many important questions, however, relating in some cases to the Great Powers themselves,

were settled down to 1914 by Congresses or Conferences. The Congress of Berlin, for instance, in 1878 revised, against Russia's will, the Russo–Turkish Treaty of San Stefano of 1878, and regulated Russia's relations with Turkey and its former possessions in the Balkans ; the second Congress of Berlin in 1885 provided for the settlement between the Great Powers of African colonial claims ; the Conference of the Powers at Algeciras in 1905 effected a temporary settlement of French and German claims in Morocco ; and the Congress of London in 1912–13 at least prevented the Great Powers from making general the wars that had been raging in the Balkans.

The Concert system therefore had a good deal to its credit, and it was natural that there should be a general wish to see it regularized and embodied in improved form in the League. It is clearly the germ of Article IV. of the Covenant whose first section runs : " The Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League. These four Members of the League shall be selected [1] by the Assembly from time to time in its discretion. . . ."

This is not the place to discuss the working of the Council [2] or the history of the League, with

[1] In practice by election in the Assembly, not always a happy method.

[2] The special competence of the Council under the Covenant includes very wide powers, among them :

(1) To "*advise* (French '*aviser*' has a more definite sense—'look to') upon the means of respecting and preserving, as against

its particular successes and failures, in any detail. An attempt will rather be made to point out certain defects inherent in the Concert method generally and as represented or transformed by the League Council.

The three grave dangers of the old Concert system were: that it included only Great Powers; that its decisions could not have universal scope; and that the Powers were often unable to reconcile their interests.

At the Congress of Vienna, the treaty-makers in their desire to guard Europe as a whole against the danger of the revolutionary spirit, paid little respect to national aspirations; but these eventually asserted themselves, and the Vienna system was finally overturned when Italy (1859) and

external aggression, the territorial integrity and existing political independence of all Members of the League." (Article X.)

(2) To "meet at the request of any member of the League in the event of any war or threat of war." (Article XI, paragraph 1.)

(3) To "recommend military sanctions." (Article XVI, paragraph 2.)

(4) To deal with questions of disarmament. (Article VIII.)

(5) To deal with disputes between Members, unsuitable for arbitration. (Article XV.)

(6) To establish a Permanent Court of International Justice. (Article XIV.)

(7) To "propose what steps shall be taken to give effect to arbitral awards or judicial decisions." (Article XIII, paragraph 4.)

(8) To "approve the appointments to the Secretariat made by the Secretary-General." (Article VI, paragraph 3; the Secretariat is the nearest approach to an international Civil Service, and has much important work in the preparation of Council reports.)

Apart from its powers under the Covenant, the Council acts for the League as guarantor of the 1919 Minority Treaties; and it is to the Council that the Permanent and Special Committees of the League report (see below, Chapter II, Section 6).

Germany (1864–70) achieved the status of national units. At Versailles, the delegates bore in mind the fate of the Vienna settlement;[1] the doctrine of national self-determination was one of their guiding principles, and they gave effect to it by the creation of numerous small European States, all nominally equal in the democracy of nations. The framers of the Covenant, while giving the great Allied Powers a special position as permanent Members of the Council, were anxious to guard against a perpetual division of the Members of a democratic League of Nations into Great Powers enjoying authority without responsibility, and Small Powers who would tend to develop a purely critical policy, knowing that their word had little effect. The original permanent members of the Council, of which the U.S.A. would of course have been one, were Great Britain, France, Italy (which gave notice of its resignation on December 11, 1937), and Japan (which resigned on March 26, 1935). A permanent seat was held by Germany from its entry into the League until its resignation (1926–35), and the U.S.S.R. has had one since its entry in 1934. The number of non-permanent seats, originally four, is now eleven,[2] of which Poland's has come to be regarded as semi-permanent. The Council of 1939 is therefore

[1] *Cf.* Harold Nicolson, *Peacemaking 1919* (page 31).

[2] The original non-permanent members were Belgium, Brazil, Greece, and Spain; of the non-permanent seats to-day (apart from Poland), seven are fixed by rotation among certain groups of powers, Latin America (3), the Little Entente, Scandinavia, the British Dominions, and Asia; while two were created as temporary seats, in 1933 for Portugal (now held by Latvia), and in 1936 for China.

removed, farther even than it was in 1920, from a Concert of major Powers. Only three out of seven Great Powers are represented, and eleven Small Powers have found a place.

The second danger of the Concert system, that its decisions could not cover a wide enough field, would, it might have been expected, have been obviated by the inclusion in the League of Small as well as Great Powers. Had the U.S.A. become a Member, the decisions of the League might in fact have ruled the world by now, assuming that Germany and Russia could later have become permanent members. The defection of the U.S.A. not only minimized its influence on the Continent of America, but made Great Britain a doubtful factor ; in the execution of League policy her fleet might have come into conflict with that of the U.S.A., and she was therefore unwilling to extend her commitments. Further, the fact that the League was not universal meant that from the first the Great Powers sought to secure themselves by other means, and that the old system of alliances was continued throughout Europe.

The third danger of the Concert system is that the conferring Powers will have no uniform interests and will not be able to reconcile their national aims ; this danger was greatly increased by the original and subsequent enlargements of the League Council to include the lesser Powers. As a deliberative machine, the Council would now in any case be too cumbrous.

There are further difficulties in forming a

definite policy under the League system. First, the wording of the Covenant may permit such freedom of interpretation that it is not easy to decide on action in the cases envisaged (*e.g.* Article X; see note 2, page 29). A second and more important check is the equalitarian principle of the Covenant (Article V, paragraph 1) that all decisions of the Council (and Assembly) require the unanimous assent of all Members represented,[1] the voice of each having equal weight. This is the principle of the *liberum veto* which allows state sovereignty to have free play on the Council, and works all the more harmfully as the Council is enlarged.[2] There is a further and even more important result of the principle of unanimity. Even were the League universal, even if it had superseded, far more largely than it

[1] The decisions of the Council acting in the League's name require a unanimous vote, including the vote of the disputants (Article V, paragraph 2), unless they agree in advance to waive their right. As an extreme instance of the stultifying effect of the unanimity rule, the decision of the Council at the outbreak of the Sino-Japanese war in 1931 is important. It assumed that it had no powers under Article X of the Covenant, except on the basis of a unanimous vote, including the vote of the disputants, *i.e.* the aggressor must join in the vote about the means of preventing aggression. See Sir Arthur Salter, *The United States of Europe*, page 185.

[2] The unanimity rule does not apply in all cases, *e.g.*:

Article I, paragraph 2.—Admission of new Members to the League.
Article IV, paragraph 2.—Rules about election of non-permanent Members of the Council.
Article XV, paragraph 6.—Report by Council on dispute between Members (unanimity here does not include parties to dispute).
Article XV, paragraph 10.—Case of dispute laid before the Assembly (but the Members of the Assembly represented on the Council must all concur).
Article XXVI, Amendment of the Covenant (but Council must be unanimous).

In other cases it may be circumvented, *e.g.* the warning appeal to Japan by the "Twelve Members of the Council," February 10, 1932.

ever did, the ordinary means of direct diplomatic intercourse, the Great Powers would probably be driven by this rule to do business directly with one another, rather than through the channel of the League Council ; when, as is now the case, four Great Powers are outside the League, the permanent conference of the Powers at the League Council will lose much of its original importance.

On the executive side the League has shown defects frequently found in Confederations of Powers. Some of its proposals needed, to give them force, not only the consent of the delegates but also the ratifications of their Governments, which was not always forthcoming (*e.g.* the Geneva Protocol, 1924). Much more important is the difficulty that the execution of the League's decisions did not fall automatically to any one central executive force, but was the responsibility of the individual sovereign nations.

The League was, it may be said, from the start no more than an enlarged " Concert." Had its scope been really universal, had its supra-national ideals really gained favour with the public, the defects of its machinery under the Covenant would have mattered less. It was not primarily the difficulties of Article X or Article XVI that made the League unable to stop the Sino–Japanese war of 1931 or the Italo–Ethiopian war of 1935, but rather impotence to interfere with less than overwhelming resources in the affairs of a " Great Power." Conversely, it was not due to the automatic operation of any particular piece of League machinery that a Greco–

Bulgar war was stopped in 1925, but rather to a collective authority over two "Small Powers" which the old "Concert" might equally well have exercised.

The League became in fact an ineffective form of Concert without any of the real power of the Concert within a limited sphere. The decisions of the old Concert were no doubt arrived at only with difficulty owing to the conflicting interests of its component powers; but the League has no great advantage owing to the size of the Council and the unanimity rule. Further, while the decisions of the Concert had immediate effect as taken by the supreme executive authorities of its component countries, the League system has always had to function beside, and usually behind, the ordinary methods of diplomatic contact.[1]

It might similarly be argued that, had the League achieved more definite results in a small sphere, it would have gained in general authority, and gradually added to the number of its Members. The combination of executive weakness and lack of universality led to its eventual failure in the sphere of world politics.

In 1787 Alexander Hamilton, in the *Federalist*, argued very forcibly against Confederate (or League) government in America, contending that sovereign powers, naturally resentful of control, are little likely to ratify and enforce measures of the Confederacy if conflicting with

[1] This difficulty was minimized when Foreign Ministers (*e.g.* Sir Austen Chamberlain) sat at Council meetings at Geneva.

their individual interests (Paper No. XV), that " the principle of legislation for sovereign powers, supported by military coercion, has never been effectual " (Paper No. XVI), that the right of equal suffrage for States of varying sizes is unsatisfactory, as is the principle of giving the minority a negative on the majority (this corresponds to the unanimity rule) (Paper No. XXII). These arguments appear to have been borne out in the international sphere since 1920; but, though Hamilton exposed brilliantly the essential weaknesses that have caused the League to founder, it is not safe to assume, without careful scrutiny, that his constructive arguments for Federalism would apply to international government.

III

The extension and continuation of the Concert system was the most important factor in the League's political activity, and as such has been given rather more space than can be accorded to the next three items of the classification adopted.

The second element in this classification was that of the territorial guarantee, of which the most famous example is the " Monroe " Doctrine. This in its original form was a declaration that the United States guaranteed the independence of the newly formed South American Republics, and would not tolerate European interference

in the Continent of America, made by James Monroe, President of the U.S.A., in 1823.[1]

Two ideas could be logically developed from the basis of this declaration: first, that of guarantees of territorial independence and integrity; secondly, that of a reserved zone of influence for certain Great Powers.[2] President Wilson wished to incorporate in the League Covenant all-round mutual guarantees, thus reforming and extending the Monroe Doctrine.[3] The revised Monroe Doctrine depended largely on the entry of the U.S.A. to the League; with the U.S.A. outside, it would have been very difficult to apply it to, *e.g.* South America, the sphere of the original Monroe Doctrine. Its effectiveness depended entirely on the power of the political and judicial machinery at the disposal of the League.[4]

The idea of a reserved zone of influence for certain Great Powers is of course directly opposed

[1] Monroe's declaration was directed against possible intervention by the Holy Alliance in South America, and against settlement by Russia in the north-west. It was probably made with the previous knowledge of Canning, the British Foreign Secretary, who recognized the independence of the South American Republics at the same time: he wished the guarantee to be a joint one by Britain and the U.S.A., and characterized the Monroe Doctrine, as pronounced, as "somewhat extraordinary."

[2] For an admirable summary of the development of these two interpretations, in American Foreign Policy, see Firmin Roz, *Les grands problèmes politiques des Etats-Unis* (1935), Chapter VI.

[3] *Cf.* particularly the Covenant, Article X, paragraph 1. "The Members of the League undertake to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League." The effect of this may be modified by Article XIX, on revision.

[4] The Treaty of Locarno 1926 may be regarded as a limited extension of the Monroe Doctrine of guarantee by and to the Great Powers of Europe. Diversity of interest and consequent external alliances invalidated it.

to the equalitarian principles of the League, and found no place in the covenant.[1] But it was an established principle of nineteenth century political thought, and is in fact still very much in force. Great Britain, to take one example, is vitally interested in the independence of Belgium, and in certain areas at least of the Mediterranean; while, in the mouths of German statesmen, the doctrine of the necessity of German influence in Middle Europe is familiar enough. An interesting attempt to graft this "regional" Monroe Doctrine on to a more complete system[2] was made by Great Britain in a dispatch suggesting a reservation to the Kellogg Pact in 1929, where she claimed "special and vital interest" in the "welfare and integrity" of territories not her own. The Japanese representative at the League was able to point to this reservation in 1932 as a justification for applying a Japanese "Monroe Doctine" to Manchuria.[3]

This second interpretation of the Monroe

[1] Unless it is permissible to trace it in the clauses establishing the Mandate principles. No doubt the Mandate system is the first step towards an international colonial settlement, and the Permanent Mandates Commission's ten members represent chiefly those States which have not been entrusted with a Mandate. But the Mandatory Powers can in case of complaint submit their own case *viva voce* to the Commission, whereas the complainants have not the right to appear. Further, their reports are often optimistic (*e.g.* French report on Syria, 1925–26, New Zealand report on West Samoa, 1928–29), and are not subject to control on the spot. The principle of the "Open Door" is not always upheld in B and C Mandates, and there is some justification for the view that these are held and managed by the Great Powers in their own interests alone.

[2] Not, however, universal at that time, when not all the eventual adherents had signed the Kellogg Pact.

[3] Italy in 1935 claimed, incorrectly, to have signed the Pact with a similar reservation with regard to Ethiopia.

Doctrine, allotting all Great Powers definite spheres of influence, would, if carried to its logical conclusion, only have the effect of universalizing the Concert's sphere of influence; and perhaps of removing all Small Powers, if "influence" was interpreted in the Nazi sense. Such a system would only emphasize the difference of aim between the Great Powers of the Concert themselves. Neither interpretation, then, of the Monroe Doctrine, in itself, automatically safeguards the world against the dangers of Nationalism.

IV

The third stream of thought eventually merged in the League Covenant was that which concerns international arbitration. Some international disputes of a grave character have been settled by arbitration before there was any universal framework for international machinery.[1] In 1899, the first Hague Conference on disarmament established a Permanent Court of Arbitration at the Hague; that is a framework to set up tribunals for special cases, consisting of a body of rules, a list of arbitrators, and a permanent secretariat, supervised by a Permanent Administrative Council of diplomats. The main results of the labours of this Court were the regularizing of mediation in international disputes, and the

[1] 1794. Mixed Arbitration Committees on U.S.A.–Canada frontier question.
1871. Settlement by international tribunal of *Alabama* case (Britain–America).

establishment of the method of " Commissions of Inquiry."

President Taft of the U.S.A. (1909–13) and W. J. Bryan, Secretary of State to President Wilson, took up the idea of international arbitration treaties to cover every stage of a dispute, and of standing International Commissions of Inquiry.[1]

There was thus a comparatively large amount of recent theory and practice upon which the drafters of the League Covenant could draw in their efforts to provide a judicial machinery for the League, apart from the wide judicial powers of the Council (Article XV). The result of these efforts is seen in Articles XII–XVII of the Covenant. In 1922 the first meeting was held of the Permanent Court of International Justice, established by the Council at the Hague, and working under it in conjunction with the existing Hague Courts.

The judicial activity of the League, and the effort to solve all international disputes by means of arbitration treaties under its supervision, has been largely stimulated by the Scandinavian countries, who were detached from the most vital European disputes. This fact is in itself significant of how effective a judicial system of international order is likely to be with the major European States. There is no provision for compulsory arbitration in the Covenant, but the Geneva Protocol of 1924, based in part on the Norwegian scheme, was destined to fill as far as

[1] Some of the treaties negotiated by Bryan are still in force.

possible this gap in the Covenant. It was in fact never ratified, chiefly owing to the refusal of the new Conservative Government in Britain (1925) to make any further commitments for this country. The gap was filled, however, by the 1928 Assembly, which produced a "General Act for the Peaceful Settlement of International Disputes," dealing with the procedure of the Permanent Court, Conciliation Commissions, and Arbitral Tribunals.

The Council has in fact, by Commissions of Inquiry, reference to the Permanent Court, and other means,[1] settled a large number of disputes between Small Powers.[2] But again it appears that the effectiveness of the Courts, the Conciliation and Arbitration machinery, depends upon the force behind the League and the respect in which it and its laws are held by sovereign States. To reform the world by setting up law courts is to approach the problem from the wrong end. Given a sufficient international authority (which from 1925–30 it looked as if the League of Nations might achieve), and sufficient respect for it among the citizens of sovereign States, international courts might be effective in major political disputes. Otherwise sovereign States will always reserve the right of judging in their own "essential" interests; and it is at least arguable that sufficient authority to ensure the execution of an Arbitral Court's

[1] In one case (Colombia–Peru) by the appointment of a Commission for the administration of Leticia for Colombia, 1933.

[2] See *Essential Facts about the League of Nations*. 1938. Pages 156–191.

decision presupposes, not a League where nations co-operate, but a sort of super-State. A great deal of the machinery of the League was directed not to eradicating the causes of international disputes, but to putting out the fires which broke out here and there in smouldering Europe : the judicial machinery in particular, while States retain their full sovereignty, is only capable of dealing with small fires.

V

The fourth stream of thought to be traced in the Covenant of the League is labelled by Sir Alfred Zimmern the " Hue and Cry." The " Hue and Cry " was the universal attempt by the whole of a primitive (English) community to arrest and punish the perpetrator of a violent crime. War, internationally, is the equivalent of murder in an ordinary community ; it was argued by Lord Parker in the House of Lords (March 19, 1917) that in the case of war all nations should, and were now ready to, mobilize their resources, without much regard for niceties of procedure, against the aggressor. War, in fact, must be prevented by a sense of international solidarity.

The application of the principle of the " Hue and Cry " to international affairs has no origins in the practice of nineteenth century diplomacy. The idea is, however, embodied in Article XI of the Covenant : " Any war or threat of war,

whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations," and less clearly in Article XVII which deals with disputes between Members and non-Members of the League.

By far the most important embodiment of this principle is the Kellogg Pact (Pact of Paris), signed in 1928 and in force since 1929. This finally fills up the "gaps" in the Covenant which permits certain types of war, binds over sixty States (including the U.S.A.) to the irrevocable renunciation of war, and affirms some kind of international solidarity.[1]

The effect of these pacts can best be judged by a catalogue of wars, declared or not, which have been waged in the last ten years. It is obvious that international solidarity is not at present strong enough to prevent war. Pacts may be signed affirming the contrary, but until they are backed by some kind of international education, they seem to have less than no value. With regard to such education, the Press and Publicity Department of the League, the Institute of Intellectual Co-operation,[2] and various national

[1] The Argentine, Brazil, and Bolivia failed to sign, owing to fears of possible conflict between the Pact and the Monroe Doctrine; the Rio de Janeiro Pact of Non-Aggression, 1933, signed by American and some European States may be said to "close the gaps" in the Kellogg Pact.

[2] The Institute consists of a Committee, advisory to the Council, an Executive Committee, and various Committees of Experts (dealing with libraries, museums, archæology, etc.). Besides an administrative Secretariat, and national committees, it works through the Inter-

League of Nations Union societies, cannot hope to compete against the immense propaganda machines of the totalitarian countries. It cannot be expected at present that an aggressor will be isolated, or that people will, from pure hatred of war, risk joining in a war that has already broken out, perhaps outside their immediate sphere of material interest.

While in Totalitarian countries war is sometimes exalted as an ennobling exercise of national virtue, the projected "Hue and Cry" systems must appear particularly Utopian. But they do attempt to undermine the supremacy of the sovereign State, allegiance to which makes the functioning of a Concert of Powers or League Council so precarious, and confines the work of an International Arbitration Court to disputes where national sovereignty cannot be affected. The appeal across national boundaries to the moral sense of mankind may not be found altogether ineffective.

VI

The last line of international thought in our classification was that which aimed at the pro-

national Institute of Intellectual Co-operation at Paris, and the International Educational Cinematographic Institute at Rome. The main criticisms which may be made of its work are :

(1) Like other League Committees it lacks funds.
(2) Its executive tends to prefer intellectual eminence to administrative experience.
(3) Its contacts are too exclusively academic.

motion of Technical Collaboration.[1] This is of a different type to those plans for international co-operation already discussed. It is designed, not to lessen the shock of collisions between the sovereign States of Europe, and not primarily to encourage the conviction that such collisions are essentially evil, but to make national governments work together in an international executive body where collaboration is obviously in the interests of each, just as municipalities have usually taken over public utility services from private enterprise. It might be hoped that such collaboration would spread from small beginnings to cover the field of economic intercourse, that the sovereign States would find that collaboration paid, and that they would then be willing in the common interest to sacrifice their sovereignty in some spheres.

The origins of what Sir Alfred Zimmern has christened "Gas and Water Internationalism" may be found in the establishment of the Universal Postal Union in 1875,[2] which has abolished State frontiers so far as concerns the conveyance of letters, and has fixed a maximum rate for postage. Here is an essential international service which does not require any political

[1] Throughout this section we are much indebted to H. R. G. Graves, *The League Committees and World Order*, 1931, especially for information about the origin of the Committees. For any more serious study, the publications of the respective Committees should of course be consulted; *Essentials Facts about the League of Nations* contains a useful summary of their present activities.

[2] Zimmern, *op. cit.*, pages 43 and following, for a full description of its organization.

sacrifice by sovereign States.[1] Unfortunately there are not many such services which do not encroach at all on the political sphere and which may justly be compared with the provision of gas or water. The question is : can States be induced to recognize that other international services, involving the sacrifice of sovereignty, are really essential? Under the stress of war conditions, when it was found that food and transport facilities had to be rationed by all the allied nations, organs of international control were established in many of the essential economic services. One of the most important of these was the Allied Maritime Transport Council (A.M.T.C.) which was engaged in "rationing" shipping. From these temporary war-time bodies are derived some of the existing League organizations, which are intended to provide facilities for international collaboration (not confined to Members of the League) in the sphere of economics and health services. Brief descriptions of the International Labour Organization, Economic, Financial, Transit, and Health Committees are given below.

A

The most important of these is the International Labour Organization. It was born, one might say, of fear. Just as the fear of revolution was always before the delegates to the

[1] Conventions governing the use of telegraph, cables, or wireless, have been far harder to achieve.

Congress of Vienna, so the spectre of Communism haunted the delegates at Versailles. But they realized that Communism provided one answer to social questions of vital importance, and that it was up to them to provide another; the Covenant itself expresses this preoccupation with social questions.[1] The charter of the I.L.O. is found in part of the Peace Treaties themselves,[2] and thus it is differentiated from the Committees which are creations of the League. It works independently of the Council and Assembly, and its chief material connection with the League lies in the fact that its budget is incorporated in the League's general budget. It is a more universal organization than the League, since, in addition to all Members of the League, the U.S.A., Brazil, and Japan are represented upon it.

The organization of the I.L.O. is important as providing for the representation, not merely of Governments, but of other classes interested in its functions. The Conference which meets once a year at least, is composed of the representatives of the component States. Each State has four representatives, two for its Government (usually technical experts), one for employers,

[1] Article XXIII, paragraph (*a*). "Subject to, and in accordance with the provisions of international Conventions existing, or hereafter to be agreed upon, the Members of the League . . . will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations."

[2] Its most important pre-war ancestor was the International Association for Labour Legislation, a voluntary body, with a permanent bureau at Basle.

and one for workmen. The Governing Body, which meets about four times a year, has thirty-two members, sixteen representing governments, eight employers, and eight workmen. Half of the Government members represent the States of the greatest industrial importance, while half are appointed by the Government delegations of the other States at the Conference. The secretarial work is carried on by the International Labour Office at Geneva under a director appointed by the Governing Body (at present Mr. J. G. Winant of the U.S.A.).

The Conference discusses and adopts draft conventions and recommendations, selected and prepared by the Governing Body and the International Labour Office (adoption requiring a two-thirds majority). Each State member must bring the draft conventions thus adopted before his Government for ratification or rejection within eighteen months. A minimum usually of two ratifications is necessary to bring a draft convention into force. The conventions drawn up by the I.L.O. have had comparatively great practical effect, especially up to 1930. Since then the number of ratifications has decreased [1] very largely. In addition to the conventions

[1] It must be remembered that countries which already have legislation covering the same field as a convention may not ratify it. The figures are :

1919–30.—30 draft conventions, 694 ratifications.
1931–37.—32 draft conventions, 69 ratifications.

The conventions ratified deal amongst other things with the eight-hour day and conditions of labour among seamen, agricultural labourers, women, and children. The most important of those not ratified deal with the forty-hour week and holidays with pay.

drafted, much important work of research into labour conditions is published by the I.L.O., which at least helps to enlighten and form public opinion on these matters, even were none of its conventions ratified or put into effect after ratification.

In point of fact, the Governing Body of the I.L.O. has considerable power to enforce conventions once ratified. Article 408 of the Treaty of Versailles stipulates that members of the I.L.O. shall make an annual report on the measures taken to give effect to conventions ratified ; further, groups of employers or workers may make representations to the I.L.O. to secure the effective observance of such conventions, and all members may file complaints about non-observance by other members.[1]

As regards its constitution and independent powers, the I.L.O. is unique among institutions directly connected with the League. The other technical organizations with which this section deals are purely advisory in their capacity, and since 1936 have brought their statutes and rules of procedure into line with regulations suggested by the Secretary-General and a special committee. They differ from the I.L.O. in that they derive from special war-time (or pre-war) organizations, and they work through the appropriate departments of the League Secretariat.

[1] In the case of representations against a Government, it may reply, and both sides of the case may be published by the I.L.O. ; in the case of a complaint, a Commission of Inquiry may be asked to intervene.

B

The Economic and Financial Organization of the League consists of four Committees, of which the most important are the Economic Committee and the Finance Committee.[1] The Economic Committee may be said to derive from the Supreme Economic Council of the Allies set up in February 1919, to continue the work of the Allied Maritime Transport Council (1917) and the Food Council (1918).[2]

Unlike the I.L.O., the Economic Committee did not receive a specific charter in the peace treaties, or in the Covenant; but the third of President Wilson's Fourteen Points on which the Armistice was based, provided for " The removal so far as possible of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace or associating themselves with its maintenance." The terms of reference agreed on by the Council for the Economic Commission in the drafting of the Treaties are more specific, but in spite of the representations to the Council of British, French, and Italian delegations, the Covenant contains

[1] The two other Committees making up the League's Economic and Financial organization, are the Fiscal Committee and the Statistical Committee. The former, set up in 1928, has carried on research on double taxation and fiscal evasion (the basis of many bilateral conventions); and the latter, set up in 1930, has been concerned chiefly with the standardization of foreign trade statistics.

[2] It had far less universal control than these war-time bodies.

no specific reference to an Economic Committee of the League.[1]

The Economic Committee was set up provisionally with the Financial Committee as a result of the report of M. Bourgeois, based in part on the activity of the Brussels Financial Conference. It was recognized in 1923 and reorganized in 1927 after the World Economic Conference. It now consists of fifteen members appointed in a personal capacity by the Council for three years and re-eligible : members are not Government representatives, but nomination is in fact often suggested by the various Governments and representation becomes therefore of a semi-official character.

Its most important work has been the preparation for the World Economic Conference and in the field of research. By a resolution of the Assembly in 1937, a number of important general subjects have been entrusted for research to the Economic and Financial Organizations (*e.g.* raising of the standard of living, the prevention of economic depressions, urban and rural housing). A special Committee reported to the Council in 1937 on raw materials, and in September 1937 the Economic Committee reported on the World Economic position. This Committee prepares conventions concerned with the removal of small causes of friction in international trade, but few have been ratified and their effect has not been

[1] Article XXIII, paragraph (*e*). " The Members of the League will make provision to secure and maintain freedom of communications and transit and equitable treatment for the commerce of all Members of the League. . . ."

very great. One of the chief difficulties of the Economic Council would appear to be that its dealings are too much with Governments and Ministries and too little with private business interests. At the same time, it has no official contact with the Ministers of Trade of the respective Governments. The Economic Conference recommended, as an ideal organization, separate advisory committees of officials, consumers and producers, acting under a Council of Ministers. Such an organization would obviate the dangers of a bureaucratic outlook, and give the advice of the Committee the greatest possible weight.

C

The history of the early development of the Financial Committee is largely the same as that of the Economic Committee. It derives ultimately from the Inter-Allied Council of War Purchases and Finance.[1] There was little idea at Versailles of the extent of the financial problem involved in European reconstruction ; and the French suggestion for a provision in the Covenant for a Financial Committee (to help France exact reparations) was disallowed. A temporary committee was, as we have seen, appointed as a result of the Brussels Financial Conference, in October 1920.

The Committee now has fifteen members

[1] Set up in 1918 ; the first of these war-time bodies to include an American representative.

appointed by the Council in a personal capacity, not as delegates of their respective nations ; it has tended to be less " official " in character than the Economic Committee. It is not empowered to set up its own sub-committees, and is thus more dependent on the Council than other League Committees ; but in view of its achievements, its prestige is comparatively high.

Like the Economic Committee, it is concerned with research [1] (which has facilitated the conclusion of some bilateral treaties) and with the drawing up of draft conventions (*e.g.* that on Counterfeit Currency, in force since 1930). But its authority is derived more from the practical experience it gained in the first decade after Versailles ; it was largely responsible for the financial reconstruction of Austria and Hungary (1922) by League loans, and with the settlement of 1,400,000 Greeks from Turkey (1924), by means of a loan issued with the provision that an independent League Commission should control the settlement of the refugees.

D

The Communications and Transit Committee carries on the work, it may be said, of the wartime transport organizations (the Allied Maritime Transport Council and the Allied Transport

[1] In 1933 the Rockefeller Foundation made a grant to the Financial Organization to promote the study of Economic Cycles, which has since been in progress.

Council for Railways),[1] and of the Communications Section of the Supreme Economic Council, set up in March 1919 with commissions in seven countries.

There are general provisions for the existing organization in the Covenant (Article XXIII (*e*); see note on page 51). Its formation was recommended in 1920, by a Committee of Inquiry incorporating a Peace Conference Committee on the International Régime of Ports, Waterways and Railways.[2] It consists now of a section of the League Secretariat, permanent and temporary Technical Committees, a General Conference, and an Advisory Committee.

The organization has some degree of independence; the Conference settles its own procedure, and has met at approximately three-yearly intervals. It has the right of choosing the nationality of members of the Committee (except those representing the Council States); the election of these members is entrusted to their respective Governments,[3] and no substitution is allowed. The procedure of the Committee likewise is under its own control, and it appoints its own sub-committees.

The organization allows countries outside the League to participate in its Conference (U.S.A., Turkey, Egypt, in 1927), and it co-operates with outside organizations (the International Chamber

[1] Run in fact by the French State Railways.

[2] Compare the Danube International Commission, 1856–1914.

[3] The size of the Committee has not exceeded eighteen, and up till 1930 thirty-two countries had been represented; hence it seems that there are no unofficially "reserved" seats.

of Commerce and the Telegraphic Union). It therefore enjoys considerable independence for an advisory Committee.

Its work is various : it has advised the Council in the arbitration and conciliation of transport disputes ; conventions and recommendations have been produced with regard to special and general questions of transit (*e.g.* Passport Conferences 1920, 1926, Conventions on Railways and Maritime Ports 1923, and unification of Buoyage and Lighting of Coasts 1930). Research is being made into the co-ordination of various forms of transport in different countries, and a system for uniform road signs has been produced. The organization has also assisted the governments of Poland, China, and Siam in the development of roads, waterways and harbours, and it has published a study of public works in various countries (1934).

There is clearly no sphere in which international collaboration would be more useful than that of communications, and no sphere where, over large questions, political and strategical interests of sovereign nations are so inimical to international control.

E

The Health Organization of the League deals with problems where the sovereign State is less likely to resent interference, and is differentiated from other committees in that it has a constitutional connection with an external organization

(the Office International d'Hygiène Publique); non-members of the League work on it, as on the Transit Committee.

During the war, an Inter-Allied Sanitary Commission worked at Paris, and, largely owing to the influence of the Red Cross, the League Covenant provided [1] in general terms for the continuation and enlargement of its work. The Health Organization was originally designed to incorporate the Office International d'Hygiène Publique [2] (set up in Paris in 1903 as a permanent international committee, to collect and spread information). It was finally constituted in 1923, and consists of a General Advisory Council or Conference which is the Permanent Committee of the Office d'Hygiène, a Health Bureau at the League, and a Health Committee containing sixteen members and three assessors. Ten of these members are nominated by the General Advisory Council, so it appears that the Health Committee is not a purely League organization. The proportion of expert official representation from the various State members has been very high. It appoints its own expert committees dealing with major diseases: it co-operates not only with the Office d'Hygiène, but with the Red Cross and the Washington Health Office.

Its work consists chiefly of the collection,

[1] Article XXIII, paragraph (*f*). "The Members of the League will endeavour to take steps in matters of international concern for the prevention and control of disease."

[2] In April 1921 the U.S. representative on the permanent Committee of the Office d'Hygiène refused to accept the scheme of co-ordination proposed by the Assembly, and only after some months was a compromise of organization achieved.

co-ordination and spreading of information about infectious diseases, and its own bureaux in Singapore and Melbourne help in this task. Further, it makes special studies of diseases, co-ordinating the results of national health policies, and organizes study tours. It has had practical administrative experience, for instance, in helping the Greek Government to stop the spread of infection by refugees.

The Committee is of course hampered by lack of funds, lack of publicity, and lack of permanent means of contact with the health authorities of various countries. But chiefly owing to the nature of its work, which is expert and entirely non-political, the Health Committee has had more universal influence than the other League Committees, and its researches are more likely to have practical results.

These technical organizations related to the League represent in sum a stage of international collaboration beyond that reached by the political side of the League. So long as the League's political influence remains small their function will be largely advisory, and their most valuable work be that of research. Their efficiency as advisory bodies may also be affected by the fact that the members are in some cases appointed by their respective national governments, and are likely to act in some sense as delegates. But at least the Committees have provided training for international collaboration, in fields where collaboration has been easiest to achieve. Despite or because of their limited powers, they have

remained comparatively far-reaching organizations, while the League has become more and more limited; and their successes suggest the importance of giving technical experts and professional interests sufficient representation in any future international government.

Chapter III

THE NATURE OF FEDERALISM

The League system probably represents the greatest sacrifice of their sovereignty to a common end which nations were prepared to make in 1919. It is possible that, given a sufficiently powerful international movement in each component State, the League machinery could be made to work adequately. But there are also obvious and typical defects in the League machinery which, in its very nature, must always leave loopholes for the sovereign State. At present the League is not working politically, and its courts of arbitration and advisory technical organizations are thereby made impotent to deal with major problems. When public opinion eventually insists on the organization of world-order, it may be content with the League system ; but more probably in face of the inevitable " gaps " in such a system and the weakness of human nature, it will look for something new.

There are, practically speaking, no examples of international government which can be regarded as models for future experiment. The inquiring mind must turn rather to types of national organization, and try to imagine how

each would work when enlarged to an international scale.

The League itself is an enlargement and variation of the Confederation type. A typical Confederation may be defined as a union of States for specific purposes, *e.g.* foreign relations, defence, financial security—a union which leaves its component States considerable independence even on these matters of common interest. Delegates of the component States meet periodically to discuss these matters, and the vote of each State has equal weight, irrespective of its size. If agreement is reached on points of defensive or financial policy, there is no central executive to enforce it; each State must do its share according to some agreed ratio. If no agreement is reached, the matter may be left unsettled or in some cases a certain majority, usually large, may by the terms of the confederation have power to force a decision on the minority—again without relying on any central executive to enforce it. The citizen of any of the component States is only very indirectly aware of the Confederate Government, particularly if, as is probable, he has no direct say in the election of delegates (who are usually nominated by the State and not popularly chosen). Its decisions are likely to bear on him only within a very limited field, and he cannot feel responsible for them. In short, he is essentially a citizen of his State, and not of the Confederacy to which his State belongs.

The League is far the largest international variation of the Confederate type of government

that has yet emerged, and it is natural that the bonds of union should be of the loosest. It was an advance that sovereign nations should consent to meet regularly to discuss their problems ; and it is not really surprising that, at such meetings, the national delegates should not always be plenipotentiaries, that the field of discussion should be limited, that the decisions of a majority should seldom prevail for the minority, and that there should be no central executive force to put them into effect. Nor is it surprising that people do not describe themselves as citizens of the League of Nations, with a national qualification.

It is not likely therefore that the extreme logical alternative to the Confederate type of government, the Union, will prevail in the international field. In a Union, such as that of England and Scotland, the central legislative and executive authority is supreme throughout the whole area, and only on comparatively minor subjects and within comparatively narrow limits is discretion allowed to local governments. The individual under the Union, however great may be his pride of regional origin, is a citizen of that Union, and is directly affected by the decisions of its legislature and executive.

Between these two political poles lies the Federal type of government, a union of independent States, which retain in most matters their sovereignty, under a central government which has powers in matters of common interest. But in these matters (always including defence and foreign affairs), the component States sacrifice

their sovereignty and give up irrevocably the right of accepting or rejecting the decisions of the Federal Government. The Federal form of government is intended to ensure at once the union (where it is essential) and the differentiation (where it is healthy) of its component parts. Representation on the Federal Government does bear relation to the size of the component States.

The individual citizens of the federated States have a direct say in the election of the Federal Government, and are directly affected by its decisions which within a certain field are unconditionally valid, and are carried out directly by a Federal executive. The individual is therefore directly and doubly interested in the Federal Government, in that he elects it and is taxed by it, while still remaining largely dependent on the Government of his own particular State. The characteristics of the Federal Government may be formulated more precisely as follows :

It involves—

(i) The union of autonomous States for a common interest.

(ii) The division of the legislative powers between Federal and State Governments.

(iii) Direct action of the Federal and State Governments within their fixed spheres on the individual.

(iv) Complete executive power of each type of government within its individual sphere.

(v) In case of overlapping, prior claims of Federal Government.
(vi) Double citizenship and allegiance of each individual.

The Federal type of government should ideally therefore combine the freedom enjoyed by the component States of a Confederation, with the security which the inhabitants of an English county expect from the central government. Enlarged to an international scale, a Federal Government should leave its component nations free to settle their own local affairs, and insist on co-operation and sacrifice of national sovereignty in spheres which are obviously of international interest.

The question immediately arises: What are these spheres of international interest, and how are they to be distinguished from the spheres of local interest? In the case of National Federations, these spheres are, practically speaking, always delimited and so far as possible previously determined by the constitution of the Federation. In fact, the existence of a fixed Constitution, previous and superior to any legislation of the Federal Government, and to any legislation by State governments subsequent to their incorporation in the Federation, might be called another mark of the Federal type of government, and is one of its most potentially dangerous features.

The constitutional difference may be illustrated by a comparison of English with American legislation. In England there is no written Constitu-

tion. The Constitution consists of, amongst other things, the mass of Acts of Parliament still in force (*i.e.* not repealed or superseded) at any given moment. Government Bills are of course formulated to agree as much as possible with existing legislation ; in case of conflict, one Bill is as "constitutional" as another, and a judge will naturally uphold the later Act as more consistent with the will of the present Parliament. In America, on the other hand, legislation may be invalidated without being repealed or superseded by Congress : it may conflict with the Federal Constitution which determines the spheres of State and Federal legislature (in language which to-day often seems vague). New Acts are not automatically submitted to legal judgment when they pass Congress, and accepted or rejected accordingly. But particular cases may arise under them, which will eventually find their way to the Supreme Court ; if, deciding on such a case, the Supreme Court finds an Act unconstitutional, the Act is thereby automatically invalidated. The Constitution therefore, although it may be amended by a complicated process, is above law ; and any Federation is, practically speaking, bound to have such a Constitution. The general or ideal features of the Federal type of government are thus clear. In the international sphere, it has obvious theoretical advantages over the Confederate or League type, in that its decisions in the sphere assigned to it by the Constitution are binding and it has the power as well as the right to enforce such decisions. How has

it worked in practice? There are no examples of International Federation on the scale which would be required to-day. We must turn to the history of National Federations, to see what lessons can be drawn from them.

The next three chapters will deal with some of the features of the history of existing Federations, the U.S.A., Canada, and Australia. The following are the points which appear to be of the greatest general interest to one wishing to draw conclusions from history, and apply them to a practical purpose: The nature of the States federated in each case, the bond of common interest between them, the occasion of their union, and the designs of their Constitutions; the relations, in practice, of the States to the Federal Governments; and, in later years, the economic policy of the Federal Governments in relation to States and individuals. In a survey so brief as this, however, it is impossible to develop fully each theme in the chapters allotted to each country. In each of these chapters therefore, apart from the historical sections, the emphasis is somewhat different. The salient feature of the constitutional history of the U.S.A. in recent years is the conflict between the Federal Government and individual business interests. The history of Canada since 1867 shows how constituent States may, by constitutional usage and interpretation, gain influence over an originally strong central government. In Australia, on the other hand, the central government has, in spite of constitutional limitations, considerably ex-

tended its power by means of economic influence. A study of these themes, as exemplified historically, may suggest the difficulties which an International Federation would have to meet, and the means by which it might be able to overcome them.

Chapter IV

THE UNITED STATES OF AMERICA

I

The thirteen English colonies, which became the original constituents of the present U.S.A., were united first in their successful resistance to the English armies, 1777–83. The first "Articles of Confederation" were signed in 1777, and the thirteen States thereby undertook to send delegates to a Congress dealing with financial and military affairs, but with no executive machinery, no power to raise money, and no power over the individual citizen; each State, regardless of size, had one vote.[1] But when the English danger had been removed for the time in 1783, the colonies seemed to have little inducement to remain united. The States, although of common origin and with few racial differences, had strongly particularist tendencies. Each colony had enjoyed a great measure of self-government, and although the English law was a common source, the statutes and methods of government

[1] By Article IX, the assent of the States was necessary for most of the important activities of the Congress.

were distinct in each. Communications were bad, and lonely communities were little accustomed to government of any kind: each State protected its own commercial interests, each had a different coinage, and frontier disputes were frequent. There was little enthusiasm shown anywhere for the affairs of Congress, and it was often difficult to find a quorum for its proceedings. In 1786, a convention of delegates from five States met to discuss the possible regulation of commerce by Congress. As a result of their report, Congress recommended the States to send delegates to a convention, to "revise the Articles of Confederation, and report to Congress . . . such alternatives and provisions therein as shall . . . render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

This was the origin of the Philadelphia Convention of 1787, which, under the presidency of George Washington, exceeded its instructions to revise the old Constitution, and prepared a new one. The draft Constitution was submitted to the several States in 1788[1] and accepted, not without a bitter struggle. One of the most important factors in securing the vote of New York (among the last to accept) was the appearance in the *New York Packet* of the series of essays, chiefly by Alexander Hamilton, known collectively by the name of the *Federalist*. In these he brilliantly argues the theoretical case for Federation versus Confederation, and although

[1] It was referred by them to conventions, not to plebiscites.

his historical and topical examples may not interest the modern reader, the general lines of his case are unlikely to be more clearly presented.

Two reasons particularly offset the separatist tendencies mentioned and drove the States to accept the Constitution. First, there was a foreign danger; Britain was established in Canada, whither many of the American loyalists had fled after the War of Independence, and Spain had recently gained from France, Louisiana, and from Britain, Florida. The fear of European intervention was therefore very real to the American citizen. The other reason was economic. The States were in financial chaos, and for want of confidence little trade could be done. Necessity no less than political conviction produced the American Constitution,[1] against the political inclinations of many Americans.

No attempt can be made here to describe fully the American political system as it was conceived in 1789, or the modifications which it has since undergone. Some important clauses of the Constitution will be treated in greater detail further on in this chapter; all that can be done here is to give a summary outline of the Federal Government as established by the Constitution, with occasional notes on its most significant modifications.

The Constitution shows clearly the predominant anxiety of the thirteen States for their inde-

[1] John Quincy Adams said "The Constitution was extorted from the grinding necessity of a reluctant people."

pendent liberties under a central government. They retained their existing Constitutions, and it was provided that States belonging to the Union should always be of a republican nature. Further, the States kept the right of determining the qualifications of those who were to vote in Federal as well as State elections. The Federal Government was given sole power to make treaties, declare war, to raise an army, issue money, levy tariffs, to regulate inter-State commerce, to exercise concurrent power of taxation, and to admit new States: all powers not expressly vested in the Federal Government were reserved for the States. The Constitution contains general guarantees of property (Article IV, 3), and the first ten amendments of 1791 (the "Bill of Rights") are a guarantee of certain liberties of the individual. The machinery of government was divided into three distinct departments, the Legislature, the Executive, and the Judiciary, no one of them responsible to any of the others. The framers of the Constitution desired above all things to prevent any one branch, and especially the "popular" legislature, from exerting undue influence. The House of Representatives was to be elected for two years only (any longer term would, it was argued, have made tyrants of them), the Senate for six years. The House of Representatives was elected in proportion to the population of the States; the Senate, in accordance with the principles of Federal Government, was to consist of two members from each, thereby guarding the rights of

the smaller States against the weight of population.[1]

The executive, of which the President is the head, is not responsible to Congress, as the British Cabinet is to Parliament, *i.e.* if one of his measures is defeated, the President is not bound to resign. The President, who is elected [2] for four years (*i.e.* the life of two Congresses) has the power of suspensory veto [3] of measures passed by the House of Representatives. His freedom in his own sphere is limited by the right of Congress to declare war,[4] and the right of the Senate in assent to treaties. The President may be impeached by the House of Representatives and tried before the Senate.[5]

Finally, measures passed by Congress and the President may still be in conflict with the Constitution. Cases arising from such measures come before the Federal Judiciary or Supreme Court,[6] whose power covers "all cases, in law and equity, arising under the Constitution," and cases of inter-State disputes. The Supreme Court is

[1] Originally the House of Representatives had only sixty-five members (one for every 30,000 persons), the Senate only twenty-six. The work of Congress is now largely done through Standing and Special Committees, which were introduced early in its history (there were five in 1802).

[2] The electoral colleges provided for in the Constitution became, after the presidency of George Washington, nothing but party machines.

[3] If, after veto, each House repasses them by a two-thirds majority they become law.

[4] By a two-thirds majority.

[5] Andrew Johnson was impeached and acquitted.

[6] This is now constituted of a Chief Justice and eight other judges, appointed by the President with the advice of the Senate, for life. Nothing is said of its numbers in the Constitution, and the President could (and has threatened to) "pack" the Court to gain a decision in his own favour.

intended to act as the infallible interpreter of the voice of the people speaking through the Constitution.

The Supreme Court has not necessarily the last word on subjects arising under the Constitution, for the Constitution itself may be amended. But amendment is a complicated process; it can only be initiated by a two-thirds majority of both Houses of Congress, or by a convention called for the purpose by the legislatures of two-thirds of the States. In either case it must be ratified by the legislatures of three-quarters of the States, or in conventions called by them. In practice, Congress has initiated, and the State legislatures ratified, amendments; they have numbered only twenty-one up to date, of which the first ten, forming a "Bill of Rights" for individuals and States, took effect together in 1791.

For most practical purposes, the pronouncements of the Supreme Court on the Constitution may be regarded as final; and it is even possible that they might pronounce themselves empowered to consider the constitutionality of an amendment.

The Constitution embodies some principles which till 1789 had never been put into practice—the guarantee of property against the government, the separation of the legislative, executive, and judicial powers, the checking and balancing of each against the others, the revolutionary change of government effected by popular consent. But most important was the institution of

a central government acting directly, and yet concurrently with State governments, upon individual citizens.

The American Constitution is the Federal Constitution *par excellence*. It is of its nature above all other American law, and has been the object of unbounded veneration in America. It has even been set to music, and Mr. Gladstone described it as "the most wonderful work ever struck off at a given time by the brain and purpose of man." Perhaps its greatest virtues are those of simplicity; it speaks a philosophic language and is contained in six comparatively short articles. But some of the general clauses contained in it have been interpreted so broadly as to pervert the sense of the whole document.

II

The story of the States' relations to the Federal Government which they had reluctantly accepted, and their efforts to secure their independence against it, is an important part of the history of the U.S.A. and of the development of Federalism. But it would be a false simplification to see the main course of American history as a conflict between parties upholding on the one hand Federal rights (Federalists, Whigs, or Republicans), and on the other the rights of the separate States (Democrats).[1] The background against

[1] The nomenclature of the parties in their early years is confusing. The anti-Federalist party, for instance, started with the name "Republican," in opprobrious allusion to their pro-French sympathies.

which the States-Federalist opposition must be viewed, is the more fundamental conflict between the interests of different regions ; the industrial North-East, the cotton-growing South, and the ever expanding agricultural West. These regions wished to secure their interests, if possible, by the aid of the existing Federal Government, and, if necessary, by backing the party in opposition. As a general rule, it is safe to say that the party in power is "Federalist," and the party in opposition Democrat.

At an early date, Alexander Hamilton, as an ardent supporter of the Federal Government, saw the advantage of attaching a strong commercial interest to it. As Washington's Secretary to the Treasury, he took over the debts of the separate States, and the capitalists of the North-East, who had lent the States money, found themselves directly interested in the maintenance of a firm Central Government. The manufacturers of the North were at the same time favoured by the tariff system, so far as it served to protect their industries against foreign competition. The non-industrial South remained firm against protectionist tariffs, which encouraged production in the North, but prevented Southern consumers from buying cheaper foreign manufactures. The South therefore supported a policy of "tariff for revenue only," and lacked the financial interest of the North in the Central Government. They were further differentiated from the North as the huge development of the cotton industry (due to the invention of Whitney's cotton gin)

had led to an increase in the number of slaves in the South, and made slavery the basis of the Southern economy.

While the West was in the first stages of expansion, and mainly agricultural in character, its interests coincided with those of the South. As its industries developed after 1850, and its railway system grew, it was naturally more inclined to join the Northern side.

Such, in brief, was the fundamental conflict of interest in the U.S.A. down to the time of the Civil War. It was this conflict that usually originated and determined the nature of Republican and Democrat parties, and the conflicts of State and Federal rights. Party labels are therefore misleading. It was, for instance, the Southern Democrat Jefferson who bought Louisiana from France in 1803,[1] by as bold an exercise of the President's prerogative as any Federalist would have dared to claim. Throughout the period of Democrat ascendency (1832–60), the Federal Government actually increased in power, by its acquisition of land in the expanding West[2] and its power of distributing the economic surplus gained from the tariff system.

Actuated usually by motives of regional interest, direct or indirect, groups of States or individual States sometimes tried to loosen their ties with the Central Government, or to interpret the con-

[1] There was a Spanish Government in Louisiana from 1789–1800, in which year it was ceded to the French.

[2] One-tenth of the land in newly formed States was allotted to the Federal Government. In return, it allotted one in every thirty-six townships to the State Government for education purposes.

nection in the loosest possible way. In the Hartford Convention of 1814, for instance, the New England States, where the shipping interests were suffering from the continuation of the war with England, met to contemplate joint action against the Federal Government which was continuing the war.[1] The State of Georgia (backed by President Jackson) in 1828–30 went against an Act and treaties of the Federal Government in its attacks on the Cherokee Indians.[2] More important, in 1832 South Carolina protested against the protective tariff laws, and under the leadership of John C. Calhoun (who had incidentally supported the tariff of 1816) declared the tariff void, and prepared to secede, even if it were necessary to fight for secession. The tariff problem was settled by a compromise, and no legal decision was given on the question of a State's freedom to secede from the Union, a question which in fact was only decided by the Civil War.

Constitutional theory was determined much more by the decisions of the Supreme Court than by the actions of the States. Individual politicians were likely to change their views on the proper relation of Federal to State authority according to the attention given to the interests of their own State (or region). But in the course of conflicts essentially regional, cases emerged in

[1] The report which they issued declared that it was "as much the duty of the State authorities to watch over the rights reserved as of the U.S. to exercise the powers delegated."

[2] The Indians remained for some time dangerous in the Southern States.

which the relation of the States to the Federal Government was more clearly defined.

This relation could be envisaged in two clearly opposed ways. The Federalists held that by the Constitution the States had finally renounced sovereignty in certain spheres for the benefit of the people, and that for the general welfare these spheres could be extended by the Federal Government; in cases of doubtful or conflicting jurisdiction, the Federal Government should have the benefit of any doubt.

The Democratic doctrine on the other hand held that the Constitution was essentially not an overriding law for the popular welfare, but a compact between the constituent States (the extreme deduction from this premiss is that a State has power to reject Federal legislation or to secede from the Union); that the business of the Federal Government lies in external relations, while internal government should be reserved to the States; and that the distribution of powers between the Federal and States' Governments ought to be permanent.

The importance of the American Constitution as a supreme law to which other laws must conform has already been emphasised. From the beginning of the nineteenth century the Supreme Court established its position as the authentic interpreter of the Constitution, authorized by the people to subject all legislation to its scrutiny. The authority of the Supreme Court was due in large measure to John Marshall, Chief Justice from 1801–35. In the famous case

of *Marbury* v. *Madison*, 1802, he held that the Constitution was above ordinary law, that the Supreme Court rather than the Executive or Legislature was the most reliable interpreter of all parts of it; and that the Supreme Court's jurisdiction must not be enlarged by statute to include that of minor Federal courts. His most famous pronouncements on the rôle of the Federal Government under the Constitution occur in the case *McCulloch* v. *Maryland*, 1819; in his judgment he sustained the National Bank of the U.S. as a valid agency, constituted under a law "necessary and proper" (Constitution, Article I §8) for the execution of the financial powers entrusted to the Federal Government. The powers definitely established under the Constitution as belonging to the Federal Government were in fact to be interpreted broadly.

In the last years of his life, Marshall was fighting a losing battle against the Democratic doctrine of States Rights. On his death (1835) the new Chief Justice, Roger Taney, upheld the doctrine of the Federal compact [1] outlined above. The Supreme Court itself did not lose in influence, for it still had the important function of maintaining the equilibrium between Federal and State Governments; but the balance was weighed in favour of the States' Governments and had to be kept in that position.

[1] Foreshadowed in the Virginia and Kentucky resolutions (drafted by Madison and Jefferson) of 1798, which protested against the extension of Federal power by the Alien and Sedition Acts of the same year (afterwards repealed). No cases had been brought to the Supreme Court under these Acts, since the integrity of the Federal judiciary was suspect.

In the *Dred Scott* case, 1857, some justices denied that the Federal Government had any independent powers in States' territories; the function of the Federal Government was that of trustee for the co-proprietor States. In the case of *Kentucky* v. *Dennison* it was held that co-operation of State officials in the execution of Federal law was not compulsory. The authority of a central Federal Government was only re-established as a result of the Civil War.

This momentous struggle was apparently caused by a moral conflict. The problem of slavery had been prudently ignored by the drafters of the Constitution, who believed justifiably that it might be settled by discussion in a few years' time. The invention of the "saw-gin," however, had made slavery an essential part of the Southern economic system. By 1844 the existence of slavery had become not only an economic but also a moral differentia between the various States. The moral issue split both "Whig" and Democratic parties, and had considerable influence in the presidential elections of 1844 and 1848.[1] Expansion in the South and West made the problem more acute. When the four States conquered in the Mexican War (California, Utah, Arizona, and New Mexico) were admitted to the Union in 1848, the Southern

[1] The Whig Henry Clay was defeated in 1844, partly owing to the defection of the anti-slavery Whigs; and in 1848, when anti-slavery men of both parties supported the dissident Democrat Martin Van Buren, the Democrat patry was split and the Whig Taylor made President.

States were anxious that slavery should be adopted in them, so that the majority of slave-owning States represented in the Senate should be increased. Under the compromise of 1850 they had to admit failure, for the admission of California as a non-slave State gave the North a majority. In 1854 the Southern States wished to secure their regional alliance with the West by opening the newly formed States of Kansas and Nebraska to slavery [1]; the result was a miniature civil war in Kansas between the supporters and opposers of slavery, in which its supporters sustained a prophetic defeat.

Opposition to the Democratic slave-owners had for some time no stable political form. The new Republican party arose in opposition to the claims of the South after 1857, when the Supreme Court's favourable decision in the *Dred Scott* case [2] (which implemented the Fugitive Slave Law of 1850) had led the South to claim a virtual extension of slavery over the territories of every State. It was from that time evident that the slave and the non-slave system could not be combined in one commonwealth.

The war which settled the problem of slavery was essentially a war for preserving the Union of the United States and for prohibiting the right

[2] In defiance of the "Missouri Compromise" of 1820, by which slavery was not to be allowed in States north of latitude 36° 30′ (the southern boundary of Missouri). The "Democrat" Supreme Court of 1855 declared the "Compromise" illegal.

[1] It was here declared that if a slave went temporarily into a non-slave State, and thereafter returned to a slave State, he was, if still a slave by the law of the slave State, not allowed to sue in the Federal Courts.

of secession.[1] Abraham Lincoln, the great Republican President, saw the matter very clearly. His object was to maintain the Union, not to maintain or abolish slavery. Only after the opening of hostilities did he move the abolition of slavery, as a tactical experiment. In order to maintain the Union, he was ready to override even the Constitution ; and the emergence of a more closely united American nation was the chief result of the Civil War. In his famous judgment on *Texas* v. *White*, pronounced in 1866, Chief Justice Chase denied the validity of the ordinance of secession ratified by the citizens of Texas, and proclaimed that the U.S.A. was an "indestructible union of indestructible states." The conflict of regional interests could no longer lead to affirmations of the " Compact " theory of federation, and of the right of secession inherent in it. The Union had come to stay.[2]

III

Since the Civil War, the chief problems of Federal Government in the U.S.A. have been of a different character. Broadly speaking, they

[1] From 1861–65 the Southern States were organized in a confederation which adapted the 1789 Constitution with a view to safeguarding State's rights. States, for instance, were allowed under it to impeach a Federal officer acting within the limits of a State.

[2] Amendments XIII–XV were added to the Constitution as a result of the Civil War. Briefly, they abolish slavery; declare that all people born in the U.S. territory and residing there, are citizens of the U.S., as of the States in which they reside; penalize those who took part in the " rebellion " ; and allow negroes the right to vote.

have become economic and social rather than regional. The early regional conflicts were often of an economic nature ; these have persisted sometimes, and even grown in intensity.[1] But the Civil War settled the question of national unity, and with the development and industrialization of new regions in America, the economic problems transcended regional barriers. It was not the North-East alone that wished for protective tariffs, the South alone for a reduction in the cost of living ; the opposition became general, between business and agriculture. As regards the Federal form of government, the crucial relation was not between the Federal Government and the States, but between the Federal Government and Industry. How far could the Federal Government go in fixing rules for industry and business ?

We are accustomed to think now of the Federal Government as the champion of the workers' interests against big business ; but the conflict between the interests of big business and the workers organized in Trade Unions and claiming support from the Federal Government was in America long delayed.[2] American industrial conditions were completely unlike those prevailing in Europe. Down to 1890, the West was still being developed, and agriculture was

[1] *E.g.* the fundamental conflict between the agricultural Middle-West and the North-East, still the home of big business, from 1920–30.

[2] The States were enabled by the Constitution and by judicial interpretation to legislate against the monopolist, and did so earlier than the Federal Government ; but their measures could not, from the nature of their authority, be sufficiently far-reaching.

still expanding; between 1890 and 1930, industrial expansion continued with the continued growth of the home market and a marked rise in manufactured exports. From 1866 to 1930 there were periodic crises and waves of depression. But in the main America was a land of opportunity, not only for the business man but for the humbler worker, who might always rise, and need never fear being out of work for long owing to the shortage of labour. The worker was not therefore primarily anxious to protect himself at a comparatively low standard of living by the aid of Trade Union organization, or of a Federal legislation controlling the conditions of labour; he wished rather for a clear field in which to rise. In consequence, Trade Union organization remained weak in America,[1] and there was nothing similar to the social legislation of European Governments from 1880 onwards.

In the years of Republican supremacy after the Civil War the Federal Government increased its economic powers, but often in a way welcome to business interests. The establishment, for instance, by Federal legislation of the Inter-State Commerce Commission in 1887 eventually made

[1] The Socialist Party first appeared in 1891; it was formed by an alliance between farmers and industrial organizations, formerly the "Grangers" and "Knights of Labor," subsequently known as the "Farmers' Alliance" and the "American Federation of Labor." From this time on, the Socialist vote has been a political force, but not of major importance. The A.F.L. in 1919 repudiated the Communist doctrines of the later formed I.W.W. (Industrial Workers of the World), as un-American. Since 1936 the Committee for Industrial Organization (C.I.O.) has broken away from the A.F.L. The C.I.O. favours industrial unions, the A.F.L. craft unions; the C.I.O. has made the strike weapon much more formidable than it was before.

railway rates uniform among the various States,[1] and thereby enlarged the home market. The Commission was established under Article I § 8 of the Constitution, which gave Congress the power to regulate commerce among the several States. "Commerce" may be, and was by Marshall, interpreted as covering all kinds of intercourse; since 1877 it has been more and more confined to the sense of communication, but since 1911 the power of controlling inter-State communication has actually been extended to intra-State transport also, and business interests obviously gain by this extension. Later the foundation of the Federal Reserve Board in 1913, with twelve national banks throughout the country attached to the reserve system (though established by the Democrat President Wilson as a first step to introducing order into the chaos of American banking), was turned to the best advantage by industrialists who secured seats on the Board.

In the sphere of foreign affairs, a forward policy by the Federal Government was on the whole welcome to business. From the establishment of American influence in Cuba, Porto Rico, the Philippines, and Hawaii (1898) to the treaties which placed Haiti and Nicaragua under American protectorate (1917), the policy of "dollar

[1] Till about 1910, the State Courts and Supreme Court, often the ally of business interests, were inclined to hamper the activities of the Commission, under which the principle of Administrative Law was introduced.

From 1897–1906, for instance, the Supreme Court did not allow the Commission to prescribe maximum rates for the railways.

diplomacy" (economic penetration secured eventually by political control) had many successes.

In some cases then Federal expansion automatically helped business interest. In addition, "big business" was able to secure specifically favourable measures from the Federal Government. From 1861, the year of the Morill tariff, successive tariffs became more and more protectionist. The attempt to reduce the tariff in 1887 led to President Cleveland's failure in the election of 1888. The Payne project for reduction (1907), which would have been welcome to the country, was transformed in the Senate into the ultra-protectionist Payne–Aldrich law. Only with the election of President Wilson in 1913 was the protectionist tide stemmed by the "Underwood" tariff.

From the presidency of the Democrat Cleveland onwards there was a considerable movement of opposition to the alliance of the Federal Government and big business. This movement eventually split the Republicans, when Theodore Roosevelt in 1911 was nominated to stand for the "Progressive" section of their party; and it triumphed temporarily with the election of Wilson to the Presidency in 1913.[1] It fought against protective tariffs which, as we will see, were only temporarily reduced in 1913; it tried to legalize a Federal income tax based on property and succeeded, again in 1913; but it struggled chiefly against the great industrial

[1] There was no essential difference between the programmes of Roosevelt and Wilson.

Trusts which from 1890 absorbed small companies, dominated the market, and kept up prices. Legislation against Trusts was enacted in 1890, in the form of the Sherman Anti-Trust Act : this Act was never repealed or invalidated, but its intended effect was minimized or completely perverted by interpretation. In 1897 and 1898 it was applied to illegalize transport associations, and the Republican Presidents Roosevelt and Taft, feeling that it would hamper a necessary simplification of the industrial system, wished not to forbid but to control Trusts through some sort of Federal organization.[1] The Anti-Trust Act was effectively reversed however by the Supreme Court, and this case provides an excellent instance of the action of that body.

For most of the period 1890–1930 business had in it an ally, and reforming presidents an enemy. We have seen that it had had from early times the power to invalidate legislation as unconstitutional, when particular cases under that legislation were brought before it. From 1890 onwards the Constitution as a guarantor of property,[2] and the Supreme Court as its interpreter, have been one of the greatest obstacles in

[1] The Federal Trade Commission, with competence parallel to that of the Inter-State Commerce Commission, was set up in 1914. It could issue injunctions, and had preliminary jurisdiction in a limited sphere (*e.g.* the payment of workmen's compensation) ; in technical cases it could advise the Supreme Court and Federal Circuit Courts. Thus far it tended to support labour against business interests, at least under a reforming executive. But its actions and jurisdiction were always subject to the test of constitutionality applied by the Supreme Court.

[2] D. W. Brogan in his *American Political System* (Chap. I) describes the Constitution as originally designed to check revolution half-way. The property clauses certainly became a bulwark of later Conservatives.

the way of social legislation. The Constitution and its guarantees were first intended to protect the States against encroachments of the Federal Government; their effect recently has been rather to preclude Federal aid to the individual citizen. The clauses under which the Federal Government can initiate economic and social legislation of a wide scope are the following:

Article I, 8. "To *regulate commerce* with foreign nations, and *among the several States*. . . ." "Congress shall have the power to lay and collect taxes . . . to pay the debts and provide for the common defence and *general welfare* of the U.S."

Article I, 9. "To make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers. . . ."

The arguments used to uphold the freedom of economic enterprise from State or Federal interference are drawn from the following clauses:

Article I, 8. (If commerce is held to be *intra*-State, not *inter*-State, Federal regulation is disallowed.)

Article I, 10. "No State shall . . . pass any law *impairing the obligation of contracts*."

Article XIV, 1. ". . . nor shall any State deprive any person[1] of life, liberty, or property without due *process of law*."

[1] Both this and the preceding clause are frequently applied to corporations.

In 1895, in spite of the Anti-Trust Law, the Sugar Trust, controlling 98 per cent. of the refined sugar distribution in the U.S., was deemed to be constitutionally protected because its manufactures were local or "intra-State." [1] In 1911 the Standard Oil case showed a change of front by the Supreme Court. Here was an undeniable instance of a Trust; but it was held that, under the Constitution, the Anti-Trust Law of 1890 only applied to Trusts that interfered "unreasonably" with ordinary commerce; and the extent of "reasonable interference" was naturally determined by the Supreme Court.[2]

By a final irony, the Anti-Trust Law was used against associations of workers, who by denying their employer their work, robbed him of prospective prosperity in the shape of profits. From 1908 (*Danbury Hatters Case*) to 1914 (the Clayton Act), such an interpretation of the Sherman Act was indubitably possible.

These instances show how far the Supreme Court could go in the support of a *laissez-faire* economic system. Their methods had not altogether changed when it came to pronouncing on the New Deal legislation.

[1] This judgment was subsequently reversed by the later Chief Justices Taft and Holmes. Relying on Taft's judgment in *Stafford* v. *Wallace*, which said that it was for Congress to decide on any constant practice that "threatened to obstruct or unduly to burden the freedom of inter-State commerce," Congress in 1933 enacted the N.I.R.A.

[2] In *Munn* v. *Illinois*, 1876, the States were alowled to have the power of deciding what constituted "reasonable" interference by Trusts. But the judgment was soon reversed.

IV

With the war, the Federal Government's control of banking and industry naturally increased with the exercise of its emergency powers under the Constitution; but industry emerged from it stronger than before. The increase of exports to Europe and of Government orders at home brought in unexampled profits. Except for a brief set-back in 1919–20 (due chiefly to the contraction of the European market), the expansion of industry continued till 1929, and under the Republican Presidents Harding, Coolidge, and Hoover big business had little to fear from reforming zeal. Credit was immensely extended abroad and at home[1]; the exports of manufactured products were enormously increased; and at the same time the tariff system became more and more protectionist, under the Fordney–Pinckney and Hawley–Smoot Acts (1923, 1930). Already before 1929 a regional depression had set in: what was good for business was not good for agriculture. Production exceeded the demands of the home market, and the cost of living was raised by the tariffs.[2] In 1928 President Hoover instituted a Farm Board to extend credits amounting to 500 million dollars, but did nothing more to

[1] Not only in big loans, but by the extension of the "instalment system."

[2] In 1921 a "Farm Bloc" succeeded in forcing through the Senate legislation specially protective of agriculture, but this advantage was annulled by the tariff of 1922.

right the balance between agriculture and industry.

In 1929 the Federal Government was faced with a wholly unprecedented crisis. A " crisis " is perhaps a misnomer, for this was a collapse of an economic system. The home market could not be extended ; European countries could not afford to take American products, since they already owed vast sums to America, and American tariffs prevented the sale of their own goods in America ; the export market therefore also collapsed. The establishment in 1932 of the Reconstruction Finance Corporation, with power to grant Government credits to industry, marks the end of the dominance of private enterprise ; but the temporary measures of Hoover to meet the situation need not further delay us. The attempt of Roosevelt to meet the failure of the American system by a Federal programme, and the obstacles which his attempt encountered, are of the first importance for a survey of the possibilities of the Federal system.

President Roosevelt recognized from the first the gravity of the situation with which he was faced. His first task was the restoration of confidence ; the pre-condition of confidence was the re-opening of the banks (which had nearly all been forced to close) on a sounder basis. The banking legislation of 1933 and 1935 was not radical, perhaps not radical enough. It gave the Federal Government greater powers over the Federal Reserve Board ; but the many varieties of banks throughout the States were not forced

into a Federal system (which at the height of the depression might have been accepted, but not later) ; and by means of the Federal Deposit Insurance Corporation (F.D.I.C.), the Federal Government guaranteed the deposits in banks throughout the U.S., without having any say in the investment of these deposits. Probably Roosevelt reckoned that he could not afford to jeopardize his whole programme by a too wide increase of Federal control at the start. The Securities Exchange Commission of 1933 attempted to insure the investor, as the F.D.I.C. insured the depositor, by regulating the issue of securities and "putting the burden of truth on the seller." Thirdly, the devaluation of the dollar relieved the debtor class, particularly in the agricultural districts.

These financial measures were the indispensable basis of the "New Deal" legislation. Although they represented the antithesis of a *laissez-faire* policy, their need was universally felt, and their validity remained unquestioned.[1] Once confidence had been to some extent restored, President Roosevelt launched an immense economic programme, whose objects were to raise prices, raise wages, and increase the purchasing power of the country, to alter the economic balance of the country in favour of agriculture, and to increase the social security of the individual.

[1] The gold-clause, by which obligations issued in America usually specified a certain gold content for the dollars in which payment was to be made, was suspended by the Supreme Court's decision of January 1935.

The industrial programme of the National Industrial Recovery Act (N.I.R.A.) proved in fact a failure. In this programme, Roosevelt tried to re-establish Trust organizations under codes fixed for each industry by the National Recovery Administration, with advisory boards of employers, workers, and consumers; the provisions about prices were often observed by manufacturers, for it was in their interest to prevent price-cutting. But the organization of labour was not strong enough to secure good results in collective bargaining about wages and conditions of work. The propaganda of the Federal Government [1] was not sufficiently effective to counteract the lack of machinery to enforce the multifarious industrial codes. The work of the Complaints and Compliance divisions in conjunction with the National Labour Relations Board,[2] for the settling of industrial disputes, was eventually nullified owing to the lack of executive authority behind them. The workers' organizations did not back the Federal bodies whole-heartedly [3]; when in May 1935 the N.I.R.A. and the Wagner Act were declared unconstitutional by the Supreme Court, they had already failed.

The principle of N.I.R.A. legislation was, how-

[1] Under the President's Re-employment Agreement (P.R.A.) of June 1933, a "Blue Eagle" was to be flown by those employers who had entered into an individual agreement with the President about conditions of work and prices. The "Blue Eagle" drive had at first considerable success.

[2] Established under the Wagner Labor Relations Act.

[3] The C.I.O. however (see Note 1 on page 83) was an important factor in Roosevelt's re-election in November 1936.

ever, to be applied in narrower spheres. The Guffey Coal Act of 1935 attempted to set up N.I.R.A. legislation for a single industry, but was invalidated by the Supreme Court in 1936 (as depriving persons or corporations of property or profit without due process of law); and on similar grounds the attempt of New York State to pass labour legislation by the regulation of wages of laundry workers was disallowed in June 1936. These decisions had far greater importance than that on the N.I.R.A., and show the Supreme Court of the time as the chief champion of *laissez-faire* capitalism. Since then the personnel and policy of the Supreme Court have changed considerably; in March 1937 the New York State wage decision was reversed, while in April 1937 the new Wagner Act was sustained, and with it the right of workers to bargain collectively, even in intra-State commercial enterprises.

The President's attempts at agricultural reconstruction under the Agricultural Adjustment Act (A.A.A.) had considerable, if short-lived, success. The programme, which involved destroying large quantities of unsaleable stock, had a limited scope; it aimed at restoring prices at a low level of production rather than re-establishing to the full the old agricultural prosperity by a wide extension of the market. But within the limits of this programme, agricultural prices were raised by protective tariffs, reduced railway rates,[1] and by the "processing" taxes paid by

[1] Special rates had been adopted as early as 1925.

manufacturers on agricultural products. The comparative success of the A.A.A. was secured not least by the tradition of rural co-operation; the farmers had for some time been companions in adversity. The decision of the Supreme Court in January 1936, that the A.A.A. was illegal, as not within inter-State regulation of commerce, and comprising taxation not proved to be for the general welfare, was a very serious blow to the New Deal programme.

The most novel feature of this programme was its social legislation. The Federal Relief organizations marked the end of the period in which men were content to trust to individual initiative alone for their security, and the beginning of a new period of Federal State co-operation. Up till this time, such co-operation had taken place in the field of communications (Federal Highway Act, 1916), and education, especially in agriculture and other technical subjects (Smith–Lever Act, 1914, Smith–Hughes Act, 1917). By 1921 the Federal Government had legislated also on Workmen's Compensation and Maternity Welfare. But generally speaking, Federal legislation establishing grants-in-aid was suspect, as impairing State rights; for the Federal Government naturally wished to have some control over the expenditure of money granted for a particular purpose.

The Federal Government of 1932, however, was at last invited to go the way on which most European Governments had started forty years earlier. The Federal Emergency Relief Adminis-

tration (F.E.R.A.) granted extensive aids to State Relief Organizations, and supervised their action; it worked in conjunction with the Federal Surplus Relief Corporation which purchased surplus agricultural goods for use by the relief funds. The F.E.R.A. did not produce the immediate results which had been hoped for, and was closed in 1935.

Various forms of permanent relief funds (including grants for old age pensions, maternity, and child welfare) have been established by the Social Security Act of 1935[1]; and these have been confirmed by the Supreme Court's judgment of 1937. Unemployment is considered under this Act, not as a risk against which employer and worker insure, but as a normal cost of business for which the worker is compensated. The means of providing this compensation is complicated, and may have the effect of directing the funds of the Federal Government to richer States only.[2]

The problem of unemployment was tackled more constructively by the Public Works Administration (P.W.A.)[3] and from 1935 by the Works Progress Administration (W.P.A.). Their policy was never to provide relief without some

[1] In one case, the Veterans' Bonus Bill of 1935, a measure involving the expenditure of huge sums from the Federal Treasury on relief, was forced through Congress against the President's will. This was a special case, since veterans from the Civil War onwards have been led to expect ever-increasing financial favours from the Administration.

[2] A Federal tax is levied on all wages, and remitted when employers contribute to State insurance system. This plan safeguards the financial rights of the States.

[3] Carrying on the work of the Civil Works Administration.

kind of work ; their difficulty was to find work that could usefully and economically be done by the unemployed. States and Federal Government alike have combined some constructive experiments with their relief work. Some States utilized their resources in the shape of derelict factories, unemployed workers, and surplus raw materials to establish schemes of production for use, not for profit, by the unemployed. The schemes aroused the hostility of private industry and did not function after 1935.

The Federal Government has further embarked on some important experiments, independent of the States. The Tennessee Valley Authority, for instance, is a Government corporation not under any particular department, whose objects are the provision of electricity, and the control and conservation of the natural and industrial resources of a huge area little smaller than England. Its power to sell electricity has been upheld by the Supreme Court in 1936. An interesting plan for social reconditioning has been the Civilian Conservation Corps, working in camps for the improvement chiefly of the National Parks, and for the prevention of soil erosion.

What are the main obstacles which have held up the New Deal legislation? From the point of view of this survey the most important obstacles arise from the defects inherent in the Federal machinery, defects which are often turned to advantage by private opposition. Much of the New Deal was directed against unrestrained

private enterprise, and naturally business interests have opposed it. This opposition may take two forms, outside and inside Congress. Outside Congress it holds up the execution of the legislation ; inside Congress the President is forced to think of gaining votes by conciliating regional and business interests, and to modify legislation accordingly.[1] Even the parties which the New Deal was trying to help have not always been willing to co-operate. The workers' organizations were not strong in themselves, and were inclined to suspect the Federal Government's agencies for their dislike of the use of the strike weapon. Further, the difficulties of co-operation between Government and State have been great. The Federal Government has been reluctant to use direct taxation for the support of social services. Taxation for a specific purpose may always be declared unconstitutional ; and on the whole taxation is lighter and weighs less on the moderately rich in the U.S. than elsewhere.[2] Schemes of indirect Federal aid, by grants to States which raise certain taxes for social legislation, are always open to the danger of helping only the richer States which would need help least.

Difficulties have arisen further from the defects of the Executive of which the President is the head. The necessity of doing something quickly prevented any adequate planning of the N.I.R.A.

[1] The silver legislation of 1933 secured him the vote of the silver-producing States in the Senate.

[2] The Federal Government may not tax State securities ; it naturally refrains therefore from taxing its own, and large incomes may be invested chiefly in tax-free securities.

measures, and the absence of machinery to enforce them has already been noted; the difficulties of the P.W.A. and W.P.A. have not been so much the raising of money as the finding of suitable objects on which to spend it. A more fundamental defect of the U.S. executive system is the lack of a competent Federal Civil Service on a large scale. The patronage system whereby the President himself disposes of Federal posts has its advantages in America; it helps the President to handle Congress,[1] over which he has little power (for his veto does not help him to get the legislation that he wants). But the formation of a regular Civil Service larger than that which has grown up under the Pendleton Act of 1883 has been much discussed in the last year or two.[2]

Till 1937, however, the Constitutional difficulty in the way of the New Deal has overshadowed all others. The Supreme Court's decisions on the N.I.R.A. and the first Wagner Act, did not have great practical effect, as other forms of opposition had already killed them. But the decisions against the A.A.A., the Guffey Coal Act, and the New York Minimum Wage Act (all in 1936), were of the greatest importance; it seemed as if the wide interpretation of the "due process" clause was going to stand in the way of a wide interpretation of the "general welfare" clause, and that thereby private property (or the

[1] The large increase in posts available under the New Deal made Congress, down to 1936 at least, very pliable to the President's demands.
[2] See *Round Table*, No. 108, page 786.

concerns of private industry) was to be supported against all wide labour legislation. In February 1937 Roosevelt threatened drastic reform of the Supreme Court [1]—amounting to a form of "packing" [2] (the appointment for the occasion of justices who can be trusted to vote in the right way). In April 1937, the decisions in favour of the Social Security Act and the new Wagner Act marked the turn of the tide; since that time, the personnel of the Court has been considerably altered, the President has been able to make some appointments of his own, and his difficulties have in fact come more from Congress than from the Supreme Court. He insisted, however, on his proposals for reform of the Court, even when it was approaching nearer to his own political views, and he was heavily defeated on the subject in Congress. The Supreme Court, in its present form, with the universal power of judicial review under the Constitution,[3] must remain a possible obstacle to future schemes of social reform; and however enlightened the present Supreme Court judges may be, there is no guarantee that they will always represent the voice of the people checking a tyrannous legislation. But at least the prece-

[1] The President's Bill enabled him to appoint one new justice for each member of the Supreme Court who did not retire at the age of seventy, provided that the total membership of the Court did not exceed fifteen. Six of the nine judges of the time were over seventy. The situation was altered by the action of Justice Roberts, who in March 1937 "reversed himself" into liberalism and gave the President a working majority in the Court.

[2] See *Round Table*, No. 110, pages 309–310.

[3] It may even claim to pronounce on the constitutionality of amendments to the Constitution.

dent of recent decisions in favour of the New Deal legislation is likely to prevent for the future a completely anti-social use of the Constitution's guarantees of property.

Such, in barest outline, are the emergency measures which the Roosevelt administration has enforced or tried to enforce, and the difficulties against which it has contended. It is hard to judge the total effect, as it cannot be said that the recovery from 1934–36, the recession from 1936–38, and the second recovery still under way, took place entirely because of the New Deal, or in spite of it. It is clear at least that in spite or because of Roosevelt's centralizing legislation, some kind of recovery was achieved soon enough to make it possible for industry to dispense with Federal support and control fairly soon. There has therefore been no radical reorganization of the American industrial system. But on the whole it seems that Roosevelt's motives at least have been appreciated. An analysis of public opinion in the *Fortune* magazine (quoted in the *Round Table*, No. 112) shows that the general public has been opposed, not to Roosevelt's objects, but to his methods and his political associates.

From the point of view of this survey, the lessons of the Roosevelt experiment may be summed up as follows :

The restoration of confidence by preliminary financial measures had to be left to the Federal executive. In the field of industrial legislation, a certain degree of Federal protection has been

given to labour by the new Wagner Act which increased the worker's power of collective bargaining with his employer. As regards social legislation, the Federal Government must act by formulating plans and giving grants in aid to the States for their execution; these grants, however, are inevitably combined with some supervision of the executive authority. The co-operation of Federal Government and State was considered in the A.A.A. judgment [1] (1936) and the Railway Retirement Act Case [2] (1935) to infringe the rights of the States. But these judgments have in effect been reversed by the decision of the Supreme Court on the Social Security Acts (1937).

The most important result of the New Deal has been the recognition that the liberty of the individual is not simply the right to be left alone by the Government, but the right to certain conditions of life, unlikely to be attained under a system of unrestrained private competition [3]; it has been allowed, even by the Supreme Court, that the Federal Government must be the principal agent in securing for the individual this more positive form of liberty. The ideal means of realizing economic and social planning is to combine the financial power of the Federal Government with the executive power of the States, whenever possible. If the Federal Government's power to tax for the "general welfare"

[1] See above, page 93.
[2] Establishing a national pension scheme.
[3] Even where, as in the U.S., adherence to a political party may bring to the individual some of the benefits of social legislation.

of the U.S. continues to be given a broad interpretation, the principle of Federal-State cooperation will probably receive the best safeguard, and the political right of the States are unlikely to be in the long run diminished.

Chapter V

CANADA

I

The elements which went to make up the Federation of Canada were more diverse than the constituent parts of the American Union, and there was a long period of political experiment in Canada before the Federal form of government was finally introduced.

The Maritime Provinces, Nova Scotia, New Brunswick, and Prince Edward Island, formed an isolated block with more or less uniform interests. Canada proper, in 1864, consisted of two provinces united temporarily under a very precarious form of government. In 1791, after the American loyalists had penetrated extensively into Upper Canada (Ontario), it was organized as a distinct province, while Lower Canada (Quebec) was left to the French Canadians, who therefore enjoyed for the first time some kind of political freedom. In each of the new provinces there was a continual struggle between an English executive and a Canadian legislature ; in Lower Canada, the French Canadians struggled for complete political control against the Execu-

tive and the English minority ; in Upper Canada the chief point at issue was the establishment by the Executive of a Church to which only a minority of the population belonged.

In 1838 Lord Durham was sent to Canada as Lieutenant-Governor ; he went with the idea of forcing the Federal principle on Canada, but realized that the French Canadians would secede if granted self-government. Durham wished therefore to establish a unitary form of government, as the first step to that completely responsible self-government which in his famous report of 1839 he advocated as the ultimate ideal for the colonies. The Union actually established in 1840 between Upper and Lower Canada was by no means satisfactory. Each province was represented by equal numbers in the common legislative house ; in order to pass a measure, a ministry had to have a majority in each half of the house, and public grants to one province had to be balanced by exactly equal grants to the other. The system of equal representation became with time more and more irksome to Upper Canada, where population was rapidly increasing.

From 1858 onwards the idea of a Federation was from time to time brought forward in the Canadian Parliament, but at first it was not favourably received either in Canada or in England. It was, however, widely evident that the Union Parliament could not work satisfactorily, and soon other reasons for reorganizing and strengthening Canada were brought before

the minds of politicians. In the U.S.A., the pioneers had been opening up the West, and American government was now established in California and Oregon ; it was possible, to say the least, that the Americans would push northward, and settle on the Pacific coast to the west of Canada, and it was important to establish a Canadian government strong enough to forestall them.[1]

In 1864 a conference was held at Charlottetown and Quebec, which was attended by representatives from Canada, Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland.[2] It was unanimously agreed that some kind of Federal Government should be adopted, and with the example of America, now in the throes of civil war, before them, the delegates decided that the central Federal Power should be as strong as possible, and that sovereignty should not be claimed by any of the constituent provinces; they further resolved on the future constitution of the Federal Parliament, and it was only on the financial provisions (which entailed subsidizing the Maritime Provinces) that there were difficulties.[3]

The " Quebec Resolutions " were passed by the Canadian Parliament in 1865 as the terms of a treaty to be accepted or rejected all together,

[1] The French Canadians were at first against any westward expansion, which would probably submerge the French-Indian Catholic population established already in the Red River Territory.

[2] Canada had two votes, the rest one each.

[3] The Quebec Conference was not reported, and little is known of the details of the discussion.

not subject to separate amendments. But in the Maritime Provinces the opposition to Federation was very powerful. The New Brunswick elections of 1865 resulted in a rout of the Federal party; Prince Edward Island disclaimed the delegates it had sent to Quebec,[1] and the Nova Scotia Government could advocate nothing more than a union of the Maritime Provinces. By 1866, however, the Ministry of New Brunswick had fallen,[2] and Sir Charles Tupper had induced the cautious Nova Scotia Assembly to appoint delegates to arrange with the Imperial Parliament "a scheme of union which will effectually ensure the just provision for the rights and interests of the Province."

In November 1866 Canadian delegates sailed to England to frame with the British authorities the Act of Confederation. Resolutions had been passed in Canada providing for the local governments and State legislatures of the Provinces of Upper and Lower Canada, again to be separated under the Federation. The British North America Act was discussed in great secrecy—it was desired to present Canada with a *fait accompli*—and it was passed by the Imperial Parliament in March 1867, together with a supplementary Act providing for the construction of a railway from Quebec to Halifax.[3]

[1] It joined the Federation only in 1873, to obtain relief from debts incurred on the State railways.

[2] Over a quarrel with the Lieutenant-Governor. In 1865 Canadian Ministers had visited England, and probably were able to ensure that the provincial Lieutenant-Governors were favourable to federation.

[3] A condition made by Nova Scotia in return for its adherence to the Federation.

II

The British North America Act contains the Constitution of Canada, a supreme Federal law, with which subsequent enactments of Dominion or provincial legislatures must agree. It remains, however, a statute of the British Parliament, and as such contains no grant of power to the Dominion authorities to amend it; in this point it differs both from the American and from the Australian Constitutions (although the latter is also embodied in an Act of the Imperial Parliament). Even the Statute of Westminster (1930) which frees Dominion legislatures from the necessity of conforming with legislation on the same subjects by the British Parliament,[1] grants no power to amend the B.N.A. Act. The Imperial Parliament itself nominally refuses to amend without the consent of Provinces[2] as well as Dominion, although it has authorized the calling of a Constitutional Convention, as in 1929. It appears, therefore, that the Imperial Parliament was not precluded from exercising a very real force to implement or counteract the provisions of the Canadian Federal Constitution.[3]

[1] Such conformity was necessary under the Colonial Act, 1865.

[2] The Provinces have only once been consulted about an amendment, when it concerned provincial subsidies (1908), and the "compact" theory of Federation by which all the Provinces must agree to every change of the Constitution is evidently not justified by historical practice in Canada.

[3] The most important amendments by Acts of the Imperial Parliament have concerned the admission of new Provinces, 1871, the alteration of provincial representation in the Dominion Parliament, 1886, the rearrangement of annual subsidies paid to provincial Governments, 1908. The new Provinces added were Alberta, Manitoba, Saskatchewan, and British Columbia.

With respect to the constituent Provinces, the B.N.A. Act provides for the continuance of the constitutions of Nova Scotia and New Brunswick, which consisted of elective legislatures and executive Councils nominated by the Lieutenant-Governors ; constitutions are set up under the Act for the formerly united Upper and Lower Canada, now styled Ontario and Quebec.[1] The provisions on taxation, money bills, and veto which are made under the B.N.A. Act for the Dominion, apply also to provincial legislatures. The restrictions are important. They subject provincial legislation to the Governor-General's power of " reservation for the Royal Assent "— a virtual veto ; and the Governor-General has another important check over the provinces in the power to dismiss their Lieutenant-Governors.

The Dominion legislative power consists of two houses, the House of Commons, of which there are now 245 members, is elected [2] to represent the Provinces according to their populations, with provisions for the readjustment of the proportion of provincial representation [3] according to a decennial census ; it sits for five years and has the sole right of initiating money Bills. The members of the Senate, now 96 in number, are

[1] Provincial legislatures have the power to amend their own Constitutions, except the provisions regarding the Lieutenant-Governor. The upper legislative houses of Manitoba, New Brunswick, and Prince Edward Island have been abolished.

[2] Like the provincial legislatures, by manhood suffrage.

[3] The division of electoral districts established by the B.N.A. Act for each Province, gave rise to grave abuses under the Canadian party system. The divisions were revised by a Commission formed under Sir Wilfred Laurier's Government in 1903, whose findings were made law in 1914.

nominated by the Governor-General for life. It does not express the strict Federal principle ; for the Provinces are not equally represented, as are the States in the U.S.A. and Australia. The Senate's powers are stated only by implication in the B.N.A. Act ; since it is provided that the Dominion House of Commons shall have no greater powers than the British House of Commons, it is implied that the Senate has the same sort of powers as the House of Lords.

The executive power of the Dominion is vested in the Crown, represented by the Governor-General, who is advised nominally by the Canadian Privy Council,[1] in fact by a Committee of this Council, the Cabinet. The Federal character of the Government finds better expression in the Cabinet than in the Senate ; it is an unwritten rule that the various Provinces of Canada shall all be represented in the Ministry.

The Judicature as set up by the B.N.A. Act is incomplete. There are no Federal courts in the Provinces, but the provincial courts (Superior, District, and County) must administer Federal law, which applies in all criminal cases, amongst others. Judges of these provincial courts are appointed by the Governor-General (in practice, by the Minister of Justice), and their salaries are fixed and paid by the Dominion Parliament. In the judicial sphere, therefore, there is a large and unusual constitutional extension of the Federal power. In one important field, however, the

[1] In the Provinces there are executive Councils advisory to the Lieutenant-Governors.

provincial courts are independent. They have the duty of giving advisory opinions on the constitutionality of provincial legislation to the provincial executive, and from such opinion, unless express provision be made in the acts under consideration, no appeal can be made.

In 1875 a Canadian Supreme Court was set up with final appellate jurisdiction throughout the Dominion; but an appeal is allowed to the Judicial Committee of the Privy Council if the Privy Council is willing to grant "special leave," whereas the provincial High Courts can appeal direct to the Privy Council "of right."

The distribution of powers between Dominion and Provincial legislatures is made under sections 91 and 92 of the B.N.A. Act. This is the most extraordinary feature of the Canadian Federal system. Its founders wished to establish a strong central Government, and instead of giving it, according to American precedent, certain exclusive powers and leaving all residuary powers to the Provinces, they adopted first of all the opposite procedure; certain powers are in this case reserved to the Provinces, and the residue left to the Dominion.[1] But it is further provided that "without restricting the generality" of this distribution, the Dominion Government shall enjoy specific powers also enumerated in the Act. We have therefore two successive lists; Section 91 defines the special powers of the Dominion Government, which include the Public Debt,

[1] These residuary powers are given under Section 91 for the "peace, order, and good government of Canada."

the regulation of trade and commerce, the raising of money by any mode of taxation, borrowing on public credit, banking with the incorporation of banks, savings banks, currency and coinage, defence and criminal law.[1] None of these subjects are deemed to come within the next list, in Section 92, of powers exclusive to the provincial legislatures. These include : amendment of the provincial constitution (except as regards the Lieutenant-Governor), direct taxation within the Province, borrowing on the credit of the Province, maintenance of provincial offices and officers, municipal institutions, railways and other communications even extending beyond the limits of the Province, public works within the Province even when declared by the Parliament of Canada to be for the general welfare of Canada, and, most important in effect, property and civil rights in the Province.

Much difficulty has been caused by the conflict of exclusive powers reserved to the Dominion in Section 91 with those reserved to the provincial government in Section 92.[2] Although the B.N.A. Act provides that the Dominion powers are to have pre-eminence over the provincial powers, this provision was not designed

[1] It is noteworthy that there is no provision for Canadian action by herself in international affairs. Section 132 of the B.N.A. Act empowers the Dominion to " perform its obligations as part of the British Empire towards foreign countries arising under treaties between the Empire and these Countries."

[2] Much of the Dominion legislation under Section 91 could not but affect the maintenance of " property and civil rights " within the Province. The historical reasons for the present form of Sections 91 and 92 are well stated in the *Round Table,* No. 116, pages 841–42.

for, and has not resulted in, the complete absorption of the provincial governments' special powers. The over-careful provisions of the B.N.A. Act on this point have been the source of considerable confusion and many legal disputes between Dominion and Provinces.

Special sections of the B.N.A. Act are devoted to Agriculture, Immigration, and Education. The provincial legislature may make laws about the first two of these, but the Dominion Parliament has an overriding power to legislate for the whole of Canada. Education is also entrusted to the provincial legislatures, subject to conditions concerning amongst other things "Denominational schools." [1]

The Canadian Constitution as contained in the B.N.A. Act established then a very strong central authority, with unusual control over the constituent states; it has specific and residuary powers, power to disallow provincial legislation and to dismiss the head of the provincial executives, and control of the judicial system through out the Dominion. But these powers were to be exercised mainly through the Governor-General, who might prove to be an instrument of the Imperial Parliament; and the Dominion was still subject to the control of the Imperial Parliament, which alone could amend the B.N.A. Act, and of the Privy Council acting as a final court of appeal.

[1] The clause runs: "Denominational schools which any class of persons have by law in the Province at the time of the Union." The Dominion powers have been restricted by a narrow interpretation of "denominational schools" and "class of persons."

III

The constitutional history of the Canadian Federation is one of increasing Dominion independence, and inside the Dominion of progressive decentralization. First of all, most of the ties which bound the Dominion closely to the Crown and the Imperial Parliament were loosened, and the Statute of Westminster secured the complete legislative independence of the Dominion on internal subjects—complete, that is, except for the important powers of the Judicial Committee of the Privy Council. A brief consideration of this aspect of Canadian development is germane to our survey, in order to see how far, at any given point, Canada should be regarded as an autonomous Federation.

The power of the Crown, as represented by the Governor-General, to interfere in Canadian legislation began to be diminished in 1878. Up till that time the Governor-General's instructions from the Crown forbade him to assent to Bills covering eight subjects, of which the most important were the making of paper money into legal tender, the imposition of differential duties, and the regulation of divorce procedure. Between 1867 and 1877, twenty-one Bills were reserved under these instructions; in 1877, however, it was decided that the right which the Imperial Parliament retained of disallowing the Bills when passed,[1] was sufficient protection of

[1] As (under the Colonial Act) inconsistent with existing legislation of the Imperial Parliament.

Imperial interests, and in 1878 the form of the new Governor-General's (Lord Lorne's) instructions was changed. The prerogative of pardon in capital cases, which Lord Dufferin had exercised without any consultation in 1875, was under the 1878 instructions only to be exercised with the advice of the Cabinet; and the dismissal of provincial Lieutenant-Governors was proved in 1879 [1] to be within the Governor-General's jurisdiction only after consultation with the Ministry of the time.

By 1918 the Governor-General had become a constitutional monarch of the mildest kind, and excursions into politics on his part were discouraged.[2] In 1926, however, the office once more came into the limelight when Lord Byng refused to grant the Liberal Premier, Mr. Mackenzie King, a dissolution of Parliament, and appointed a temporary Conservative ministry which had no majority in the House of Commons and was overthrown after two days. The result of this action was the decision of the Imperial Conference of 1926 to confine still further the sphere of the Governor-General's action. He was to be, and now is, not the agent of the Imperial Parliament in Canada, but the representative of the King. He is appointed by the King on the advice of the Dominion, and his right of reservation is to be exercised only according to the constitutional practice of the Dominion, not

[1] In this year, the Lieutenant-Governor of Quebec, Letellier de St. Just, was dismissed.

[2] *E.g.* the pro-imperialist activities of Earl Grey, 1905–10.

according to the advice of the Imperial Parliament.

Another link with the Imperial Parliament was finally broken in 1930 by the Statute of Westminster. This abolished the Imperial Parliament's right to disallow Dominion legislation (under the Colonial Act of 1865), on the ground that it conflicted with its own legislation. It was provided, however, that nothing in the Statute of Westminster applied to the amendment of the B.N.A. Act, and that the " Powers conferred [by the Statute] upon the Parliament of Canada or upon the legislature of the Provinces shall be restricted to the enactment of laws " relating to matters within the competence of each.[1] Thus the relation of Dominion to Provinces was not in any way affected by the Statute of 1930.

Canada cannot yet, however, be said to be completely independent of Great Britain constitutionally. There remains, as a final Court of Appeal from the Canadian Supreme Court, the Judicial Committee of the Privy Council, one of the last remnants of the prerogative jurisdiction of the King-Emperor. Leave has to be granted by this Committee to hear appeals from the Supreme Court of Canada, but most important disputes about points of constitutional law come before it. And we have seen that under the Federal form of government, constitutional history is made very largely in these disputes at law.

[1] Mr. Aberhart interpreted this guarantee very widely in saying that the Statute of Westminster made Alberta a sovereign state.

The Privy Council has played a considerable part, as will be shown later, in upholding provincial rights against the Dominion Government, and has often seemed to strain the terms of the B.N.A. Act in so doing. The Act contains only one of those general guarantees which have proved so powerful an instrument in the hands of the American Supreme Court. The exception, however, the rights of the Provinces under Section 92 to legislate concerning "property and civil rights within the Province," is a very important one. If it is broadly interpreted, and the residuary powers allotted to the Dominion Government are interpreted narrowly, as only to be exercised in time of national emergency, the whole centralizing trend of the B.N.A. Act can be reversed.

IV

Within the Dominion, general conditions have made for decentralization. The following are the points to which attention will specially be drawn: (*a*) The wide extension of Canadian territory after the B.N.A. Act has included in the federation Provinces with very different interests from those of the original constituents, and has thereby emphasized regional differences; and within the enlarged Dominion racial and religious distinctions are still very much in evidence. More specific considerations are: (*b*) The provisions of the B.N.A. Act in favour of the Dominion Government have been considerably

modified by constitutional practice, and by the growth of a party system; and (*c*) the Privy Council has usually protected provincial against Dominion rights, and has of late emphasized the Federal character of the B.N.A. Act, even when many of the Provinces would have welcomed an increase in the scope of Dominion legislation. For all these reasons, the centralizing tendencies which have appeared in the U.S.A. and Australia have been effectively counteracted in Canada, in spite of the nature of its constitution.

A

There is in Canada a conflict of regional interests similar to that in the U.S.A. The Western agricultural Provinces gain less than Ontario and Quebec from the tariffs, which are the chief source of Dominion revenue. They have felt the world economic crisis most severely, and borrowed heavily on Dominion credit. It was in Alberta that in 1935 the curious experiment in Social Credit was launched; while Saskatchewan, after a series of disastrously dry summers, has had to rely very largely on Dominion aid for the restoration of her finances. Another difficulty of the Western Provinces is the cost of transport. The Dominion was created largely by an East-to-West railway system subsidized very heavily by the Central Government, and the Western Provinces are anxious that the railway companies should run with the smallest possible

profit.[1] It is not surprising that they have favoured recent schemes for the institution of a Dominion Loan Council to regulate and facilitate Dominion assistance to the Provinces, while the more prosperous Ontario was indifferent, and the Maritime Provinces objected that such a body would curtail their provincial rights. The growth of provincial independence in politics is illustrated by the attempts to establish the right to " recall " provincial delegates to Ottawa, in order to make them conform to a locally formulated programme.

As regards differences of race and religion, Canada has received, like the U.S.A., a large variety of European immigrants[2]; but by far the most important community marked by a national and religious difference is that of the French Canadians, who have lived in Quebec now for three hundred years. This minority has actually increased of late in proportion to English-speaking Canadians[3] and in political importance. The 700,000 French Canadians outside Quebec enjoy full minority rights as regards education. In the Province of Quebec the French Canadians completely control the legislature; and in Dominion courts and the Dominion Parliament the French language is used officially as well as English.

[1] In the Railways Inquiry Commission before the Senate, 1938, amalgamation of the Canadian Pacific Railway and the Canadian National Railway was urged, and it was alleged that immense economies could thereby be effected.

[2] Not always with happy results; the immigrants, content with a low standard of living, have often supplanted earlier settlers, and driven them to seek more prosperous conditions in the U.S.A.

[3] There are more than three million to-day.

There is, however, a strong nationalist and separatist tendency, which was shown as early as the South African War (1900), and most violently on the introduction of conscription in 1917. The economic depression gave nationalism new strength in Quebec, and "Communism" was a convenient enemy against which to mobilize all kinds of French and Catholic organizations, under the battle-cry of "refrancisation," which meant the expulsion of Anglo-Canadian influence from industry, politics, and education. The defeat in 1934 of the liberal Taschereau régime which had been in power for thirty-seven years, and the advent to power of a new "Union Nationale" party under Maurice Duplessis, was another sign of the strength of nationalist feeling. The new premier has curtailed freedom of speech (anti-Catholic criticism), and has encroached on the rights of the English minority by an enactment that, in cases of doubt, the French version of a law shall always prevail over the English. Mr. Duplessis has announced that he would tolerate no move towards secession from the Dominion. It is clear, however, that Quebec under his régime could not be included in a strongly centralized Federation.

B

Geographical and racial conditions in Canada, then, point to a comparatively decentralized form of Federation as the most suitable kind of government. Although this form is not provided by

the B.N.A. Act, the Constitution has been constantly changed towards it by practice and by interpretation.

The Senate, for instance, was intended presumably to be a support of the Dominion Government, since it was not constituted on what is usually considered to be the Federal principle. Provinces are not equally represented on it, and the weight of numbers in the larger Provinces (heavily represented in the House of Commons) is therefore not counteracted as in the U.S.A. and in Australia. Quebec, Ontario, the Maritime and the Western Provinces have twenty-four members each in the Senate. Appointments are made by the Governor-General, but are nearly always limited to the party in office. Their appointments are for life, and are based on a property qualification ; and the Senate is naturally often accused of representing conservative business interests. Its most important powers were intended to be revisionary. In financial legislation, it seems to have established for itself the power of amendment (not of initiation), and in 1936 gained an important victory over the House of Commons in rejecting a Bill to establish a Loan Council. In ordinary legislation, it has in practice been chary of exercising its right of veto more than once.[1] Cabinet Ministers do not sit in the Senate any longer, and debates therefore may lack reality for want of expert information.

[1] In 1926 the Senate vetoed an Old Age Pensions Bill ; when, after a General Election, it appeared again in 1927, it was passed by the Senate against the convictions of many senators.

The Senate has not provided an antidote to party and sectional differences. The party system prevails in its debates, and it has failed, all in all, to provide that impartial counsel which was expected from it. Its importance has steadily decreased, and there is a considerable movement in favour of its abolition.

If the Senate's function has been indefinite, the Federal principle has been upheld in the Cabinet (not explicitly mentioned in the B.N.A. Act), which by usage includes representatives of the diverse Provinces, races, and religions of the Dominion. There are obvious disadvantages to this usage, which may prevent the inclusion of men of ability because their Province is already too heavily represented ; but it ensures that the Ministry keeps in touch with varieties of opinion throughout the country.

Some of the specific powers granted to the Dominion have been little used. Control over the provincial executive, for instance, by means of the Lieutenant-Governor has not been exercised. The history of the disallowance of provincial legislation, nominally by the Governor-General, in fact by the Minister of Justice, is more complicated ; but on the whole the Dominion has exercised this power less and less often. From 1867–93[1] provincial legislation was frequently

[1] There are three exceptions to this before 1893 ; in 1886 Thompson, Minister of Justice, refused to veto a provincial Act on the grounds that it was *intra vires* for the Province ; and again in 1888 on the ground that the Act involved did not affect the Dominion ; and Blake, Minister of Justice, 1875–77 refused to veto a provincial Act on the ground that it concerned a matter for local legislation.

disallowed, not only as conflicting with the terms of the B.N.A. Act, but also as inconsistent with principles of justice and equity. Disallowance on the latter ground has excited criticism as infringing upon provincial autonomy, but it was defended on the ground that, as constitutional inconsistencies are the province of the courts, the Minister of Justice should concern himself with cases that fall outside judicial review.[1]

From 1893 onwards the Dominion has been reluctant to interfere with provincial legislation on any grounds. In 1895 and 1898, in two cases before the Privy Council, Lord Herschell upheld the exclusive power of provincial legislation as virtually absolute, even although the legislation might be such as to invite abuse. The remedy for an abuse of the legislative power was to be found, not in condemning legislation beforehand, but in bringing a case arising out of it before the courts. This decision has in the main determined the policy of the Dominion Government; but there have been two important exceptions to the rule of non-interference. In 1918 the Minister of Justice, Charles Doherty, disallowed an Act of British Columbia, which invalidated a contractual obligation between the Dominion and a railway company; and an important decision, evoking much criticism, was made by the Liberal Government [2] of 1923 in disallowing on general

[1] In the U.S.A. practically any moral issue can be reviewed under the general clauses of the Constitution; the B.N.A. Act has not so wide a scope.

[2] A change of policy; the Liberal party from 1903–10 had upheld provincial freedom from Dominion interference.

grounds an Act of the Nova Scotia legislature concerned with provincial subjects only. Since then the power of disallowance has only once been exercised, against Mr. Aberhart's legislation in Alberta, and on the special grounds that the provincial legislation denied its subjects access to courts of justice.[1]

C

Perhaps the most important factor in determining constitutional interpretation in Canada has been the decisions of the Privy Council. The sections of the B.N.A. Act which bear particularly on Dominion-Provincial legislation are Numbers 91 and 92, in which the special powers of each are enumerated. The two lists, as appears at first sight, overlap,[2] although it is provided that in cases of conflict the Dominion power is supreme. Further, the special rights of the Provinces might be held to conflict with the general residuary powers of the Dominion. Nevertheless the Provinces have successfully upheld their rights, and even enlarged them.

In 1882 the Privy Council upheld the

[1] The more particular ground of disallowance was that Sections 91 and 92 could not be construed as Mr. Aberhart wished. In effect he pronounced that the "Social Credit" scheme for control of banking was a protection of "civil rights" (Section 92) and could not be overridden by the Federal Government's power to control banking (Section 91).

[2]

Section 91.	Section 92.
"Marriage and divorce."	"Solemnization of marriage."
"Raising of money by any mode or system of taxation."	"Direct taxation within the Province."
"Any general regulation."	"Civil rights and property."

Dominion's right to regulate liquor traffic in the Provinces, under the power given in Section 91 to legislate for the general welfare (*Russell* v. *the Queen*). In the next year, however, the decision was in effect reversed, when in *Hodge* v. *the Queen* (1883) Ontario was allowed the right to issue liquor licences under its own legislation. The important principle was affirmed that Ontario had full legislative authority of itself, and was in no sense a delegate of the Imperial Parliament ; and in 1892 it was equally affirmed that the Provinces derived no authority from the Dominion Government.[1]

The Privy Council has not consistently upheld the extreme provincial interpretation of the B.N.A. Act. In 1915 (*John Deere Plow Co.* v. *Wharton*), it refused to extend the " civil rights " clause to make a Dominion company register in British Columbia before functioning in that Province. But it has always tended to restrict the residuary powers of the Dominion to legislate for the general welfare ; in the important case of the *Toronto Electric Commissioners* v. *Snider* (1925), Viscount Haldane held that the residuary powers could only be exercised in time of national danger.[2]

In their interpretation of Sections 91 and 92 the Privy Council has therefore acted as a decentralizing influence. In other types of cases

[1] In *Liquidation of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*.

[2] In 1882, it was held, the Privy Council must have thought drunkenness a national danger for Canada when giving their verdict in *Russell* v. *the Queen* !

it has also tended to support provincial claims to independence, *e.g.* in their powers of legislation on the procedure and authority of their own Parliaments (*Fielding* v. *Thomas*, 1896) ; and of taxing external agencies (*Bank of Toronto* v. *Lambe*, 1882) and of taxing federal officers (*Abbott* v. *City of St. John*, 1908).[1]

In interpreting the B.N.A. Act, the Privy Council has had little regard to the historical circumstances in which it was passed or to the intentions of the " fathers of federation." It has had only two general clauses (" general welfare " and " civil rights ") on which to exercise its interpretative skill, and has in fact only used the latter in at all a wide sense.

Of late there has been much agitation in Canada against retaining the right of appeal to the Privy Council. It has been criticized for the haphazard method of selecting its judges in any particular case ; it has been accused of ignoring the expert judgment of the man on the spot, of favouring big financial interests, and of aggravating the grievances of racial minorities by its support of provincial legislatures—for the Provinces tend to be less liberal than the Dominion in these matters. The criticisms of the Privy Council have gained in point and intensity by its decisions of June 1937 against the greater part of the Bennett legislation (which corresponded to Roosevelt's New Deal legislation). These de-

[1] Decided by the Canadian Supreme Court, but out of deference to a previous decision of the Privy Council on a similar case from Australia (*Webb* v. *Outrim*, 1907). (See below, page 140).

cisions are so important as to merit more than a cursory mention.

The Employment and Social Insurance Act was declared unconstitutional, as involving unjustified disposition by the Dominion Government of money raised by taxation. Three other statutes, dealing with weekly rest, minimum wages, and limitation of hours, were based on International Labour Organization conventions. Mr. Bennett decided to ratify and enforce these conventions by statute, although their subjects would usually have fallen under the scope of provincial legislation. The Privy Council decided that as Canada had no right under the B.N.A. Act to enter into treaties except as a member of the British Empire, it could not be constitutionally bound by the I.L.O. conventions. Therefore the subjects of this legislation must be considered as no more immune than any other to judicial review, and fall within the sphere of "property and civil rights" wherein legislation was given to the Provinces, not to the Dominion. It was further decided, following Lord Haldane's opinion of 1925, that the residuary powers of the Dominion could only be exercised under "abnormal circumstances," or under threat of "extraordinary peril to the material life of Canada"; a world economic crisis, as has been well remarked,[1] is not considered sufficient justification for the use of the Dominion's residuary powers.

[1] See *Round Table*, No. 108, page 760. We are much indebted to the whole of this article.

It is abundantly clear, therefore, that the Privy Council has more power of interpretation than would at first sight appear ; and it has used its power completely to reverse the original sense of the B.N.A. Act. The Dominion's powers have virtually been confined to those enumerated in Section 91 ; its residuary powers have been nullified ; in fact, with the wide interpretation given to the " property and civil rights " clause, they have been transferred to the Provinces. The achievement of the Judicial Committee is more dramatic even than that of the U.S. Supreme Court.[1]

V

The trend of constitutional interpretation has therefore been towards decentralization. There remains, however, one very potent bond of union between Dominion and Provinces, that of the Dominion's financial supremacy.

It was provided at the time of the Confederation that the Provinces should raise part of their revenue by direct taxation (it was impossible for them to raise all of it by this means), and that the Dominion Government should make subsidies to them out of its revenue. These subsidies were paid on a *per capita* basis, according to the population of the Provinces. One of the few amendments to the B.N.A. Act took place

[1] A Bill to abolish the appeal to the Privy Council has passed its first reading in the Dominion Parliament, and is now being considered by the Canadian Supreme Court. See *Round Table*, No. 116, pages 846–47.

in 1907, in order to effect a general revision of these annual subsidies. At present, when the Provinces have been hard hit by the depression, and the Federal power has been largely decentralized, the Dominion has most of the money, but little control of how it is spent by the Provinces.

Much of the Dominion's money, however, has lately been expended in grants-in-aid to the Provinces for specific objects. Sometimes these grants have been made in a concealed form, as when railway construction was expanded before the war by the sale of securities guaranteed by the Dominion. More often direct grants have been given, for Highways (1913, 1919), Agricultural Instruction (1913), Unemployment Relief (1938), and Vocational Education (1931). These specific grants have been much criticized on the ground that they buy for the Dominion influence in spheres which the Provinces regard as their own. But in the depression the provincial governments were more inclined to complain that the Dominion did not take on the expense of the social services in return for the money which it gained from direct taxation. The burden of supporting the social services has in fact often been shifted by the Provinces to the municipalities, which have suffered most severely from changed conditions.

The invalidation of Mr. Bennett's "New Deal" legislation by the Privy Council was therefore in present circumstances of great importance. It has excited a wide desire to amend the B.N.A. Act, not only in regard to the appeal to the Privy

Council, but in its division of economic powers and responsibility between Dominion and Provinces.

An attempt was made in this direction in 1936 when the project of setting up a Loan Council [1] was discussed, to regulate the spending of the Provinces and supervise their borrowing, and to take over in return provincial debts. At the time of discussion, Alberta refused to consider the scheme, and shortly afterwards was forced to default on a State loan, while Saskatchewan, which was willing to co-operate, received advances from the Bank of Canada to meet its debts. The Bill designed to amend the B.N.A. Act and institute the Loan Council was rejected by the Senate where there was a Conservative majority.[2] After its defeat, co-operation in the regulation of provincial finance could only be voluntary.

Not only in the financial sphere, but also in that of social legislation, the Provinces have by the B.N.A. Act more powers than they are able to exercise. Industrial troubles have in Canada, as in the U.S.A., arisen only comparatively lately ; trade union organization has not been strong, and under the Dominion Industrial Disputes Investigation Act of 1907 an effective machinery for arbitration and conciliation was established. Of late the American Committee of Industrial Organization (which attempts to substi-

[1] See *Round Table*, No. 104, page 837 and following.

[2] On what was no more than a point of drafting ; the Bill gave authority to the Provinces to levy money by a sales tax, as the Dominion does, and this was considered unconstitutional.

tute industrial for craft unionism) has had some influence, particularly in Ontario ; but there is no large industrial proletariat in Canada, and the workers' organizations, like the provincial governments, wish to achieve their objects as it appears by constitutional means.

It is evident that the movement for constitutional reform in Canada will be very widely supported, and that such reform will probably result in the financial strengthening of the central authority. In 1937 a Royal Commission was appointed under the chairmanship of the Hon. Mr. Rowell, Chief Justice of Ontario, to investigate taxation throughout the Dominion and the division of financial responsibilities between Dominion and Provinces. Its report is due to be published shortly, and will be of the utmost importance for the future of Federation in Canada.

Constitutional practice and the decisions of the Privy Council have given the Provinces the due independence which was denied them by the B.N.A. Act ; it remains to be seen whether they will secure this independence by willing co-operation with the central government in establishing financial equilibrium in the Dominion.

Chapter VI

AUSTRALIA

I

The history of the Australian Federation is still a brief one, and dates only from 1900. Even within the limits of this survey, therefore, we can take a more comprehensive view of Australian than of American or Canadian problems.

The constituent States of the Australian federation are six in number—New South Wales, Victoria, Queensland, Tasmania, South Australia, and Western Australia.[1] These States had not the long and varied history of the constituent American States, nor were they differentiated by any diversity of races, such as distinguished Upper and Lower Canada. By the time of their federation under the Commonwealth of Australia Act, 1901, most of them had enjoyed responsible government, in differing forms, for some time. New South Wales and Victoria in 1855, South Australia and Tasmania [2] in 1856, Queensland in 1859, and Western Australia in 1890 were

[1] Two scantily settled provinces, Central and Northern Australia, are governed at present directly by the Federal Government.

[2] So called officially for the first time in 1856; formerly Van Diemen's Land.

granted the constitutions[1] which (with considerable alterations in the case of New South Wales and Victoria) they retain to-day. As had been the case in America, experience of the difficulties of parliamentary government (*e.g.* the struggles between Assembly and Council in New South Wales and Victoria) was valuable in drafting the Federal Constitution.

The States had a nominal bond of union in their connection with the Imperial Parliament, which could veto all their laws, not only those affecting the interests of Empire, and for a short time (1850–61) in the person of a Governor-General, a title temporarily given to the Governor of New South Wales. There was nothing, in the mid-nineteenth century, but particularist feeling[2] to keep the colonies from joining in some form of union or federation; but the possible advantages of such a connection were seen and urged only by the British Government and a few statesmen.[3] The colonies lived largely from their customs revenue and felt they could not afford to sacrifice it.

It was, however, danger from foreign Powers which eventually led the colonies to consider Federation as a practical project. The establishment of a French convict settlement in the New Hebrides (1864) caused temporary alarm; in

[1] Consisting of elected Parliaments and Upper Houses or Councils either nominated (*e.g.* New South Wales till 1933, and Queensland till 1922) or elected from and by a limited class.

[2] Intensified by the system of convict settlement, which persisted in Queensland and Western Australia longer than elsewhere.

[3] Wentworth, Deas Thompson, and Gavan Duffy in particular.

1883, however, it was rumoured that Germany was contemplating the annexation of New Guinea. The Province of Queensland sent a magistrate formally to annex the territory ; but his action was disallowed by the British Prime Minister, Gladstone, who had been officially assured that Germany had no designs in the neighbourhood. These assurances were belied by German annexation in the next year. The colonies began then to realize that in matters of foreign policy they must help themselves, and that, to ensure strength, some form of union was necessary.

In 1885 a Federal Council was formed by an Act of the British Parliament, with power to pass laws on matters of interest to Australia as a whole (excluding Defence and Tariff Policy) ; but it had no revenue or executive authority, and was further crippled by the refusal of New South Wales to attend its meetings. Sir Henry Parkes, the premier of New South Wales, wanted a strong Federal Government. In 1889 the report [1] of an English officer, General Edwards, showed that Federation was essential to secure Australia's defences, and Parkes started an agitation which led to a conference of State representatives in 1890. This conference decided that a central Government must be set up, and handed over the task of framing a Constitution to a National Convention of delegates appointed by all colonial Governments, including New Zealand. On the

[1] Following the Colonial Conference of 1887, where it was decided that Australia should contribute £126,000 per year to the expenses of her defence by the British Navy.

crucial points of a uniform tariff and powers for defence, agreement was reached. But the draft Constitution met with severe criticism from free trade interests, and from the newly formed Labour party in New South Wales. As the other colonies had united under New South Wales' lead, it seemed that Parkes had failed.

In 1892, however, he embarked on a popular campaign, urging that the matter was essentially one for the people to decide. A severe financial crisis in 1893 helped his cause, and it was agreed by a conference of Premiers that a Convention to draft a Federal Constitution should be popularly elected. The Convention (containing members from all colonies except Queensland) met in 1897, and produced a draft which was eventually passed (even in Queensland) by popular referendum.[1] The British Parliament passed an Imperial Act to set up the new Constitution, and the Commonwealth of Australia Act became law in June 1900.

II

Although it is formally contained in a British Act of Parliament external to Australian legislation, the Constitution of Australia was in essence a popular measure and has taken its place, like other Federal Constitutions, as the supreme law of the land, superior to subsequent Acts of the Federal legislature which it sets up ; indeed, the

[1] Western Australia only decided by referendum to join the Commonwealth in July 1900, after the Commonwealth Act had been passed.

fifth section of the Constitution itself, declares its own binding force.[1] Amendments can be initiated by a majority of both Houses of Parliament,[2] and ratified only by a majority vote of all the electors throughout the Commonwealth, and a majority of votes in each State. Theoretically, amendment is easier than in America; but in practice only three [3] out of eight referenda taken, have passed in Australia, and only one of these was of great significance (the Financial Agreement Validation Act of 1929). It should further be remembered that the Australian Constitution does not contain the American guarantees of property and liberty against the Government, and therefore cannot be so freely amended by judicial interpretation; and finally, the Imperial Parliament has the power to veto amendments.[4]

The Australian Constitution is established then as a law above laws. It establishes a Commonwealth Parliament consisting of two houses. The House of Representatives is elected every three years, originally by procedure decided severally by each State, but as early as 1902 the

[1] "This Act . . . shall be binding on the courts, judges, and peoples of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State. . . ."

[2] Or by a majority in one house, though it must be presented to the other House a second time, after an interval of three months in such a case. In practice this will be done only if the House which makes the proposal is the House of Representatives, as a referendum can only be held on the advice of Ministers responsible to that House. Cf. *Report of the Royal Commission on the Commonwealth*, page 50.

[3] (i) 1906, *re* the time of the Senatorial elections; (ii) 1910, in connection with the Surplus Revenue Act, to enable the Commonwealth to take over debts of the States incurred after as well as before Federation; (iii) 1929, see text.

[4] And even amendments to the Constitutions of the States.

Commonwealth passed a law enacting universal suffrage over the age of twenty-one. Its numbers are in proportion to the population of each State. It shares the power of initiating legislation with the Senate, but has sole power of initiating financial legislation, on which the Senate can do no more than recommend omissions and amendments. The Senate can veto finance and other Bills, and in case of a prolonged deadlock, the matter is settled by a majority vote in joint session.[1] The Upper House, or Senate, like that of the U.S.A., is meant to safeguard the rights of the States against the weight of population in any one; six Senators are elected from each State for six years; they are eligible for re-election, and half retire every three years. This part of the Constitution, however, has not worked satisfactorily, since the seats tend in fact to go by blocks to one party in each State.[2]

The distribution of powers under the Constitution between Commonwealth and States resembles that in America; certain powers are reserved exclusively to the Federal authority, while the residuary powers are vested in the States. The Commonwealth has no power to disallow State laws. The Commonwealth Government has exclusive powers over defence, customs duties, postal services, lighthouses,

[1] The Governor-General is empowered, in the event of the Senate rejecting a bill a second time after a three-month interval, to dissolve both Houses, and if the newly elected Houses still disagree, to call a joint session. Presumably the Lower House would prevail, as it has twice as many members as the Senate. The process occurred in July 1914.

[2] See *Round Table*, No. 110, page 398.

quarantine, citizenship, immigration, and foreign affairs; both Health and Education[1] are left to the States. It was agreed that the Federal Government should have power to help in inter-State commerce, and communications, and should have the power of imposing taxation. Section 51 of the Constitution which enumerates the powers given to the central Government covers a fairly wide range of subjects, and it was clear that the Commonwealth could not pass laws on all of them at once; it was therefore enacted that until the Commonwealth legislated on these subjects State law should remain in force; and so far, in certain subjects (*e.g.* marriage, weights and measures) States laws are still in force. In point of fact there is concurrent legislation on a number of subjects (*e.g.* taxation), and in others, Commonwealth legislation is indirectly limited by State rights. The Federal Government, for instance, has not exclusive legislation in foreign affairs; the States have retained their Agents-General[2] in London, and have, on some occasions, communicated directly with the British Foreign Secretary: further, the Commonwealth Government is in practice bound to consult the States in making treaties, since the terms of the treaties may not override State powers, and their execution will devolve on the States.

The States derive these powers with regard to foreign relations from the peculiar connection

[1] The Commonwealth grants aid to State institutions.

[2] They bear the same relation to the States as the High Commissioner does to the Commonwealth.

of Commonwealth and States alike with Great Britain. This connection does not influence the character of Australian Federation as profoundly as might appear.[1] Amendments of the Constitutions of Commonwealth and States are, it must be admitted, still nominally subject to the veto of the Imperial Parliament. But, on the other hand, appeal to the Judicial Committee of the Privy Council has been practically eliminated. The Governor-General is, as in Canada, merely a representative of the Crown, not a delegate of the Imperial Parliament; and the Statute of Westminster has given Australia full Dominion status, and removed any danger (already remote) of an Imperial veto on Australian legislation under the 1865 Colonial Act.

The executive powers are, under the Constitution, vested in the Crown, as represented by the Governor-General for the Commonwealth, and the State Governors for the States. In practice, a Cabinet system like that prevailing in Britain has been adopted, whereby Ministers are responsible to Parliament and must have a seat in the House of Representatives. Both constitutional and conventional executives are nominally independent. The States governments have the right of dealing directly with the Crown, through their Agents-General in London. In 1930, however, the States voluntarily renounced this right of dealing direct with the Crown, over the

[1] That is, from a constitutional point of view. But the fact, for instance, that Australia has for a long time relied on the British Navy for defence has profoundly affected its economic system.

Development and Migration Agreement, a possible symptom of future co-operation. Then the State Premiers have voluntarily come together for conference almost every year since Federation; and in 1929 it was decided that a Premiers' Conference should be held regularly in May; the Commonwealth is normally represented at these meetings, and latterly the Prime Minister has attended himself.

The Administration of Commonwealth and States is distinct, although again there is voluntary co-operation and utilization *inter se*. Western Australia, for instance, came to an agreement with the Commonwealth in 1921, that the Commonwealth should collect all the taxes in the State, and in 1923 the Commonwealth agreed with the remaining States, that all income-tax should be collected by the State.

In the sphere of jurisdiction, the Constitution provided for the establishment of a Federal High Court (corresponding to the Supreme Courts of the U.S.A. and Canada), and for the creation of other Federal Courts. Only one other Federal Court has in fact been set up—the Court of Conciliation and Arbitration, established under Section 51, xxxv. of the Constitution (see page 154). Federal law, apart from the exclusive jurisdiction of the High Court, is administered by State Courts, subject to certain modifications.[1] The

[1] (i) Cases are tried under State law, but Federal law fixes the maximum penalty; (ii) The Governor-General has to approve magistrates who judge in offences against Commonwealth law; (iii) Juries are elected and empanelled by the State, but are summoned by the Commonwealth.

High Court has the duty of interpreting the Constitution, and has jurisdiction in cases between States *inter se* and in cases to which the Commonwealth is a party. Appeals from the highest State Courts can go before the High Court or to the Judicial Committee of the Privy Council; but there is no appeal from the High Court to the Privy Council "unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council" (Constitution, Section 74). Appeals can be made on points of Commonwealth law or of State law to the High Court, which thereby gains a wider jurisdiction than the Supreme Court of the U.S.A.[1] On the other hand, the Australian Constitution contains no "Bill of Rights," and so does not admit of such varied interpretation as the American.

The Privy Council has not had much influence in interpreting the Australian Constitution. It differed from earlier decisions of the High Court in 1907, in holding that State taxation of Federal officers did not interfere with Commonwealth instrumentality (*Webb* v. *Outrim*). As a result the Judiciary Act of 1907 was passed, enacting that in future all questions concerning Commonwealth *v.* States and inter-State disputes were to be under the exclusive jurisdiction of the High Court, and therefore unable to reach the Privy Council except by permission of the High Court itself. Certificates of Appeal have only been granted on two

[1] The New York Minimum Wages Act came before the Supreme Court as transgressing the Constitution—the "Bill of Rights."

subsequent occasions ; once, when the Bench was equally divided (*Colonial Sugar Case*, 1914),[1] and in 1936, when a majority of the judges dissented privately from an award which had been given on grounds of precedent (*Dried Fruits Marketing Case*).

The Australian Constitution, like the American, assigns the residuary powers to the States, but judicial interpretation has tended in Australia to strengthen the hand of the Central Government. The delimitation of Commonwealth and State powers by " Case Law " is of more than constitutional interest, as the rulings given have affected the settlement of economic disputes. The first judges of the High Court were inclined to act on the " compact theory " of federation, and to apply the doctrine of " immunity of instrumentalities " to State as well as Commonwealth ; their successors, however, have favoured the Federal Government in their decisions.

In *D'Emden* v. *Pedder* and *Deakin* v. *Webb*, 1904, the High Court reversed the verdict of State Courts and disallowed State taxation of Federal officers. These decisions, as we have seen, were in their turn reversed when the State of Victoria appealed direct to the Privy Council in 1907 (*Webb* v. *Outrim*). But in *Baxter's Case* (also 1907), the High Court, in face of the Privy

[1] The points at issue were (i) whether the Commonwealth had power to appoint a Royal Commission on sugar ; (ii) whether some of the questions put by this Commission when appointed could be justified under the Constitution. All the Australian justices answered the first point affirmatively, but were divided upon the second. The Privy Council answered both in the negative.

Council's decision, upheld its own former decision on this point. Two Acts of 1907 extricated the Commonwealth from the impasse thus reached: the Judiciary Act already noticed, which virtually destroyed the influence of the Privy Council in Australia; and an Act legalizing State taxation of Federal officers.

The line taken in *D'Emden* v. *Pedder* was applied *e converso* in 1907 in the *Railway Servants Case*, when the High Court awarded that a union of employees of the New South Wales State Railways could not bring the State as a party to a dispute before the Court of Conciliation and Arbitration. This award is the keystone of the anti-federalist case.[1] But in the next year, in 1908, it was evident that State immunity was not to be upheld on all occasions, as the High Court allowed the charging of Federal customs duties on steel rails imported for the use of the New South Wales State railways (*Steel Rails Case*). In 1920 the ruling of the *Railway Servants Case* was frankly reversed in the famous *Engineers Case*, when the High Court allowed Victoria to be brought as a party to an industrial dispute before the Court of Conciliation and Arbitration.

Two other cases may be cited to show the centralizing tendency of judicial review in Australia. Incidental to the *Whybrow Case* in 1910, occurred an instance of conflict between a Federal and State award on the question of

[1] See T. C. Brennan, *Interpreting the Constitution*, for a detailed discussion of these cases from an anti-federal point of view.

Minimum Wages ; here the High Court declined to give a ruling, denying that there was any conflict if the higher wage were paid ! But in 1926 the conflict of Federal and State award (a Federal forty-eight hour week versus New South Wales' forty-four) was central to the *Cowburn Case*, and the High Court ruled that in case of conflict the Federal award should stand.

III

The economic and financial powers of the Commonwealth Government under the Constitution are considerable, and they have been steadily increased. They include control of foreign and inter-State commerce, uniform direct taxation, customs, borrowing money on the public credit, bounties for production and export, banking other than State banking, currency and coinage, the control of railways for defence, the acquisition and construction of railways (with the consent of States concerned). The distribution of the revenue surplus and of direct grants-in-aid form a close economic tie between the Commonwealth Government and the States.

The most important of these Commonwealth constitutional powers is that of fixing the tariff and receiving revenue from the Customs. This power is bound generally to be of great use to a Federal Government, which is enabled thereby to obtain much of its revenue by indirect taxation; whereas the States usually have to resort to direct

taxation, which is much more deeply resented by the people.[1] The Government may by its tariff policy [2] create agricultural or industrial interests which transcend State boundaries and depend on the Federal authority. In Australia particularly the power over the tariff is important, since its economy has always relied on a protectionist system, and the Labour party in particular has supported a high tariff to ensure the security of Australian producers and urban workers.

Before Federation, the constituent States had relied very largely on the revenue from Customs to make their budgets balance, and by Section 87 of the Constitution (known as the "Braddon Clause") it was provided that "for ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides," only a quarter of the revenue collected from the Customs should be expended by the Commonwealth [3]; the rest was to be paid to the several States, or applied towards the payment of interest on State debts taken over by the Commonwealth. Payments from the Consolidated Revenue fund of the Commonwealth were

[1] The Commonwealth also has power to impose direct taxation. *Cf.* 1910, a land tax (the first tax imposed other than the Customs duties); 1914, estate duties; 1915, income tax; 1916, entertainment tax; 1917, excess profits; also a 10 per cent. tax is charged on note issues by private banks.

[2] The Commonwealth Government is advised on tariff policy by an Expert Tariff Board.

[3] For the first two years after Federation, inter-State tariffs were continued; tariffs, though collected by the Commonwealth, were fixed by the States and remained their property. Western Australia was given the special privilege of maintaining inter-State tariffs for another five years, as a bribe to keep her in the Federation.

not made in proportion to the population of each State until 1908 (Surplus Revenue Act). In 1910 the payments under the Braddon Clause were commuted for a fixed payment to each State of twenty-five shillings per head of its population, and 5 per cent. interest on State Public Works taken over (*e.g.* post offices, etc.). The distribution of surplus Commonwealth revenue is at present fixed under the Financial Agreement Act (1927–29), which provides for the payment of a fixed sum yearly to each State for fifty-eight years. This sum is at present in excess of the former *per capita* payment, but it is reckoned that if the population of the States increases according to expectations, the Commonwealth will be the gainer after about fifteen years ; further, if the proportion of the population of one State to that of the others alters considerably, it is clear that the payments will have to be revised.

Besides these payments to the States under the Financial Agreement Act, the Commonwealth makes various other direct grants. Special aids were given to Western Australia and Tasmania under the Surplus Revenue Act of 1910, and the States Grants Act of 1927. The primary producing States, Tasmania, South and Western Australia, are adversely affected by the high protectionist policy of the Commonwealth ; but the Grants Commission, set up in 1933 to review the claims of the various States, found that this disadvantage was offset by the benefits gained from taxation distribution. Commonwealth taxes

are raised on the basis of riches irrespective of State boundaries, but are distributed on the basis of population. Hence the agricultural States which are less populous and have a smaller taxable capacity per head gain at the expense of the industrial States. The Grants Commission held that it would be uneconomic from the point of view of the Commonwealth as a whole to compensate the people of these States, as this would tend to keep population static and to stop the natural drift towards the industrial areas which leads to the most productive development of Australia as a whole. On the other hand, the Commission advocated the subsidizing of governments in the agricultural States in order that they might maintain a minimum standard of efficient service—again because it is to the interest of the whole Commonwealth that such service should be maintained.[1]

Grants-in-aid have been given for the construction of roads, under the Main Roads Development Act of 1923–29, and the Federal Aid Road Act of 1926. The latter Act is of interest as it involves considerable State supervision by the Commonwealth, and illustrates how financial matters lead to the encroachment of the Commonwealth on State rights. In the field of education, direct Commonwealth grants have been confined to the furtherance of higher education and research, and have not, as in the U.S.A., been directed towards technical education or industrial and agricultural research. The Wire Netting Act

[1] See *Round Table*, No. 102, page 402.

of 1927 is an interesting example of State aid by the Commonwealth. Under this Act, the Commonwealth borrowed money at 5 per cent., which it lent to the States for their development by settlers. The States paid only 4 per cent. on this loan into the National Debt Sinking Fund, and the maximum rate of interest to be charged on the settlers borrowing from the States was to be 4 per cent.

The Commonwealth is frequently involved in indirect grants to individual producing interests. Under the Constitution it is allowed to pay bounties on goods produced for export.[1] Butter, wheat, and sugar have been extensively subsidized, and not always economically, since the inefficient farmers have been sheltered by the Commonwealth policy of keeping up the home price and subsidizing exports.[2] The sugar subsidy is of peculiar interest ; sugar has been produced since the war largely in Queensland, and it was important to a Commonwealth Government not only to retain the Queensland vote, but to keep up the prosperity and population of Queensland in case of possible invasion by Japan. The sugar agreement, renewed in 1936, provides that the Commonwealth will import no sugar, and will keep up the price of sugar, while Queensland will provide enough sugar for Australian and export requirements.

[1] This power is not exclusive. States have power to grant certain bounties, *e.g.* for the working of metals.

[2] On the whole subject of subsidies and bounties for Australian primary products, see W. R. Maclaurin, *Economic Planning in Australia*, Chapter XII.

The Commonwealth Government's attempts to regulate production and prices in other fields have been decisively checked. There has always been some doubt as to the meaning of Section 92 of the Constitution, which provides that " . . . trade, commerce, and intercourse among the States . . . shall be absolutely free " ; it was held by the High Court in 1920 (*McArthur* v. *Queensland*) that this section prohibited interference by State Governments but not by the Commonwealth. If it applied to the Commonwealth also there would be no meaning in Section 51, which empowers the Commonwealth to "make laws for the peace, order, and good government of the Commonwealth with respect to trade and commerce . . . among the States." In 1928 the Commonwealth Government passed, with the consent of the States, an Act regulating the proportion of dried fruits to be consumed within Australia, and the proportion to be exported. It had not allowed such attempts at regulation by the separate State Governments. In 1935 the High Court upheld the Act (on the precedent of *McArthur* v. *Queensland*), but as a majority of the Bench dissented privately from the award, an appeal to the Privy Council was permitted. The Judicial Committee held that Section 92 of the Constitution bound Commonwealth and States alike, and declared the Act invalid, thus deciding that the Commonwealth Government had no power to help producers by the regulation of inter-State markets.

The Commonwealth Government was more

decisively defeated in March 1937, by a referendum decision of the Australian people, who voted by 2,214,388 to 1,259,808 against amending the Constitution to give the Commonwealth extensive powers over marketing. The question before the voters appeared to involve the further extension of Commonwealth power, rather than the merit of marketing schemes in general,[1] and the result may be compared with the gradual alienation of American public opinion over the New Deal reform measures after about 1936.

One of the most important spheres of State control into which the Commonwealth Government might penetrate by its financial strength is that of communications. The Commonwealth has under the Constitution power to control railways for defence (that is, it may legislate to ensure that inter-State railways run efficiently), and to acquire and build railways with State consent; it has a general power, too, derived from its control of inter-State commerce; and, most important, it can influence the prosperity of State railway companies by its tariff policy.

The State railway systems are usually run at a loss, and are a heavy drain on State economy. Gauges vary between States,[2] and States apply preferential and tapering rates to keep commerce within their own boundaries. Thus it would appear that there is scope here for Commonwealth action; the Commonwealth Government

[1] See *Round Table*, Nos. 105, 107; quarterly reviews of Australian affairs.

[2] South Australia has six gauges, Western Australia, New South Wales, and Victoria four, Queensland three, and Tasmania two.

has not, however, taken any radical measures. In 1912, an Inter-State Commission was set up on the lines of the American Inter-State Commerce Commission, with power to adjudicate in cases of discriminatory railway rates. But in the *Wheat Case* (1914) the High Court decided that the Commission's exercise of judicial powers was unconstitutional, and thereby settled its fate.[1] The Commonwealth has gained powers to construct particular railways (generally transcontinental lines)[2] and in 1924 appointed a Commonwealth State Commission to consider the possibility of a uniform gauge. But no legislation has resulted, and the Commonwealth has made altogether very little progress towards control of communications.

IV

The Commonwealth Government has gained influence over State policy, chiefly by means of three special bodies, set up in accordance with

[1] The Royal Commission on the Commonwealth (1929) recommended the re-establishment of the Inter-State Commission, with extended powers to study the question of Commonwealth grants to States, and other such general economic problems as double taxation. This was not adopted, but the Grants Commission was set up in 1933.

[2] 1910, Northern Territory Accession Act empowered the Commonwealth to build railways in South Australia and to buy lines from it.

1911, an Act was passed enabling the Commonwealth to construct a line from South to Western Australia, and in 1918 these States granted the Commonwealth the land on which the line was built.

1924, Grafton–South Brisbane Railway Act, whereby the Commonwealth embarked on a joint enterprise with New South Wales and Queensland, to construct a uniform gauge on a transcontinental line. Expenses were to be shared between all three parties.

the Constitution, but not specified in it: the Commonwealth Bank, the Loan Council, and the Court of Conciliation and Arbitration.

The Commonwealth Bank was established in 1911; the State Banks were not functioning well, and the Commonwealth wished for a secure source of funds, such as the States possessed in their Savings Banks, from which to finance public works and the transcontinental railway which it was contemplating at the time. Since 1924 the Commonwealth Bank has had the full powers of a central bank. Its directors are appointed by the Commonwealth Government and it is authorized to deal with deposits, the issue of notes (since 1920), exchange, reserve of gold, loan and trust funds, and all matters concerned with the Commonwealth consolidated revenue. The constitutional status of the Commonwealth Bank was at first questioned, for the Constitution itself authorizes the Commonwealth Government to do no more than "make laws with respect to banking other than State banking, and with State banking beyond the limits of the State concerned." But no decision had been given against the Bank,[1] and the Royal Commission on the Commonwealth approved it in 1929.

Since that date, the Commonwealth Bank has

[1] In *Heiner* v. *Scott*, 1914, Chief-Justice Griffiths held that the Bank was not an instrument of Commonwealth Government; Powers J. held that, *qua* savings bank, it was such an instrument, but not *qua* its commercial powers. The case of *Butterworth* v. *The Commonwealth Bank*, 1916, was also indecisive, as the Commonwealth Bank was not at the time a bank of issue, and could in this case only have been condemned as such.

played a very important and independent part in the financial policy of the Commonwealth Government, particularly during the years of depression. Before this time it did not advertise for deposits, and business men dealt usually with private banks; from 1929–34, however, the volume of deposits in the Commonwealth Bank steadily increased. Further, it acquired the gold reserves of the trading banks, and assumed complete control over exchange operations and the issue of Treasury Bills. From 1929 onwards it was able to stand effectively in the way of the desire of successive Governments (in particular Mr. Scullin's, 1930) to borrow largely and to start an inflation. It should, however, be noticed that, while the depression increased the importance of the Commonwealth Bank, there was no wholesale failure of State banks, such as had happened in America.

The Loan Council also increased its prestige in the depression, and it has a large measure of control over Australian financial policy. During the war and subsequent years, the Commonwealth Government raised substantial loans abroad for the benefit of the States. The Loan Council was set up provisionally in 1923, as the result of an unofficial agreement between States and Commonwealth to confer on the raising of loans; but its scope was considerably diminished in 1925, when New South Wales resigned, thinking that it would be able to raise larger loans on its own credit.

In 1924 an agreement was reached whereby

the Commonwealth might take over State loans, and interest was to be paid by the States into a National Debt Sinking Fund. In 1927, the Loan Council was temporarily authorized by law to take over such transactions, pending the result of a referendum on a constitutional amendment. The referendum was successful, and by the Financial Agreement Validation Act of 1929, the Loan Council was set up as the sole authority for the raising of Commonwealth and State loans. The Council consists of a representative of the Commonwealth and a representative of each State ; State representatives have one vote each, but the Commonwealth representative has two and a casting vote. Both Commonwealth and States have by this Act virtually surrendered the ultimate control of their budgets to this body, as it has the power to limit deficits and borrowing ; undoubtedly State autonomy has been more impaired thereby than by any Act since Federation. At the time of the onset of the depression the Loan Council was an invaluable instrument of economic control ; without some such body, not directly connected with either Commonwealth or State Governments, it would have been very difficult to secure co-operation. It was in fact the Loan Council, by its appointment of a sub-committee of expert economists, which was responsible for the financial recovery programme adopted by the Premiers' Conference of 1931, and known as the " Premiers' Plan."

The authority of the Loan Council was firmly

established as the result of the litigation ensuing from New South Wales' default on its overseas interest in 1931. The deficit was paid by the Commonwealth according to the terms of the Financial Agreement, and an arrangement was made for repayment by the State. The next year, New South Wales defaulted again ; the Financial Agreement Enforcement Act was then passed, enabling the Commonwealth to retain from State revenue sums which it had been forced to pay for interest on State loans. On the Commonwealth claiming the money due from the New South Wales revenue, the State took the case to the High Court, which gave judgment against it,[1] and refused to certify an appeal to the Privy Council. It seems therefore that the Loan Council now occupies an impregnable position in the Australian economic system.

The last field of Commonwealth-State relations to be considered is perhaps the most interesting ; it concerns industrial legislation. The force of organized labour in Australia has been much greater than in America, and the interests of big business have not weighed so much with the Commonwealth legislature or with the High Court. Thus two of the factors which in America operated to restrain the Federal power in economic spheres have been absent in Australia.

In 1904 the Court of Conciliation and Arbitra-

[1] Though the other States disapproved of the defaulting, Victoria and Tasmania supported New South Wales in the High Court, on the ground that the Commonwealth was seeking power contrary to the spirit of the Constitution.

tion was set up to deal with inter-State industrial disputes. In 1907 it achieved immense prestige in the *Harvesters' Case*, when it gave 42s. a week as the minimum basic wage, a sum higher than that generally fixed in the various States. Accordingly, it became the object of the working man to come under a Commonwealth award. But the power of this Court was limited by Section 51, xxxv. of the Constitution whence it was derived. By this section the Commonwealth is empowered to "make laws for the peace, order, and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." Hence for Commonwealth intervention three conditions must be fulfilled: (i) an actual dispute must have arisen, (ii) it must be a dispute affecting industry, and (iii) it must involve more than one State. Twice (in 1910 and 1926) there have been referenda to amend this section of the Constitution and to give the Commonwealth wider powers, but on both occasions the proposals were negatived.

Nevertheless, the clause has been circumvented in various ways: (i) Disputes could always be manufactured in order to secure a hearing before the Commonwealth Court; true, the earlier judges of the Court were against "machine-made" disputes, but later judicial interpretation has taken a fairly wide view of a "dispute"; (ii) the term "industrial" has been extended to cover works that are not carried out for profit

(municipal undertakings, etc.); (iii) there has been considerable inter-State federation of Trade Unions, so that a very much larger proportion of workers could thereby be brought under Commonwealth jurisdiction.

Despite these practices, the anomaly still remains that, while the power to legislate for industry belongs to the States and not to the Commonwealth, the Commonwealth can make arbitral awards in a certain class of industrial disputes, a class which, as we have seen, has been widely extended. In 1910, in the *Whybrow Case*, it was held that an award of the Court of Conciliation and Arbitration could not be made a "common rule"; it could apply only to the parties to a dispute, and could not be extended to non-Unionists or to members of a Union in the same trade who were not party to the dispute. This decision tended to increase the number of respondents involved in Commonwealth Arbitration cases. But again the central authority has been extended; in 1926, in the *Cowburn Case*, a "common rule" was allowed to follow from a Court award upholding a forty-eight hour week against New South Wales' forty-four. The paradox results that the Court of Conciliation and Arbitration can make a law by award where the Federal Parliament has no power to legislate!

The same year, and arising from this case, a referendum was taken, asking for fuller powers for the Federal Government in industrial legislation, but it was rejected. In 1929, in the Maritime

Industries Bill,[1] the Bruce-Paget Government adopted the logical alternative, and tried to give the States the arbitral powers complementary to their legislative power in regard to industry. The motion was heavily defeated and the Government fell ; Australian Labour felt that it had to thank the Arbitration Court for maintaining a reasonable standard of living, and did not wish to entrust itself to State rulings.

The Arbitration Court has remained a very powerful force ; by now it is the practice of the Court to make a three-monthly adjustment of wages to the cost of living on a basis of a food and rent index compiled by the Commonwealth Statistician. State awards, whether given in the State Courts or by Wages Boards,[2] tend to follow the rulings of the Arbitration Court closely. In 1931, the Court played an important part in the adjustment of the Commonwealth economy to the depression, by announcing a basic wage cut of 10 per cent.

Australian constitutional history differs from that of the U.S.A. in that organized labour has always had considerable influence in Australia, and has been inclined to extend the central Government's power in the economic sphere. The Australian political system differs from the Canadian in that Australia has succeeded in

[1] It proposed to abandon the Arbitration Court and to leave to the Federal Government arbitration only in cases concerning Maritime Industries (as being a strictly federal sphere). The Royal Commission on the Commonwealth had advocated this, as the best alternative in face of the rejection of the 1926 referendum.

[2] State Courts in New South Wales, Queensland, South and Western Australia ; Wages Boards in Victoria and Tasmania.

emancipating itself more completely from the Imperial Parliament and the Privy Council. Finally, the most distinctive mark of the Australian system is the executive influence which the central Government has acquired, both through the practice of voluntary Commonwealth-State co-operation, and more particularly by means of its special creations, the Loan Council, the Commonwealth Bank, and the Arbitration Court.

Chapter VII

CONCLUSIONS

I

It may seem to the reader that this book has been a chronicle largely of conflicts between State and Federal Governments, and of petty legal disputes. Can the Federal system under which they arise be considered suitable for an association of sovereign States and the achievement of the beginning of world order?

It must be admitted that the Federal system under the inevitable fixed and supreme constitution, gives rise to a legalistic habit of mind; the legislator, for instance, may be tempted to inquire first not whether a particular law is good for the people, but whether it is constitutional. Again under a Federal Constitution, States may be tempted to rely too much on the financial strength of the central power, and use their own powers wastefully in the knowledge that they can eventually call on the Federal Government to help them out.

Against these general arguments it may be urged that the countries which are governed under a Federal system have in the main prospered.

Though it may be due in part to the differences of Latin and Anglo-Saxon stock, the contrast in power and prosperity between the Federated States of the U.S.A., and the still sovereign States of South America may be ascribed partly at least to the merits of the Federal Constitution of the U.S.A. It is more important, however, to remember that the difficulties of a Federal system are not unavoidable. We have dwelt on them at some length, but not with the idea that they are inevitable obstacles to any National or International Federation. It should be said rather that these are difficulties which are likely to arise under a Federal Constitution, and which plans for an International Federation should try to circumvent.

With this caution we may draw from the preceding chapters some general conclusions about the circumstances in which Federal systems are likely to originate and the probable nature and practical effect of their Constitutions.

Two factors have always been present among those that induced States to combine under a Federal Government: the fear of danger from foreign Powers, and the inconvenience of economic separation.[1] It is hardly necessary to point out how powerfully the fear of danger from abroad affects the life of all European nations to-day. There is every inducement for the countries which live in fear of the Totalitarian

[1] Another common factor of the Federations considered is the contiguity of the Federating States. This factor should be considered carefully by those who plan, *e.g.* a British Commonwealth Federation.

Powers to unite ; they have organized a very loose form of alliance, and they may be forced by circumstances to strengthen this alliance considerably by pooling so far as possible military and economic forces. On the other side, the Axis Powers dominated by Germany already have to submit to very strict military and economic plans entirely in the common interest. In time of war, there is no doubt that we are bound to imitate them, but with the difference that no one Power on our side will be suspected of aiming at a position of complete dominance.

So far, then, present conditions are only too favourable to the beginnings of a Federal system. It is further possible that even without a war, discontent with existing economic conditions might create a popular movement for some kind of international government. The disadvantages of a system (or anarchy) under which political frontiers automatically become economic barriers are very clear. Such a system prevents the most rational exploitation of the world's chief sources of raw materials, at best heightens the cost of living, and at worst produces "starvation in the midst of plenty."

The resistance to economic union would doubtless be far greater than that to a close defensive co-operation. Driven by the fear of war, all nations have striven for some degree of self-sufficiency, even when it costs them far less to import than to grow their own raw materials, or to manufacture substitutes. Large private interests are involved in the maintenance of

wasteful economic systems aiming at national self-sufficiency, while the governments of sovereign States might find it difficult at first to do without the revenue gained by customs duties, for instance, which are from the consumer's point of view essentially wasteful.

It is possible, however, that parties of the Left, representing Labour interests, could (and very important that they should) be won to the idea of improving general economic conditions by working out an international economic plan along Federal lines. It is noteworthy that in a European Federal Union, " Labour " with its parallel organizations and unions existing already in each country, would probably form far the most important international " party " ; and it is Federal rather than State Governments which in existing Federal systems, especially Australia, have supported the claims of Labour against private interests.

There are, moreover, forces in existence to counteract those interests. Apart from the inspiring vision of an international economic order, there exist to-day in the I.L.O. and the League Economic and Financial Committees bodies which are doing the ground-work of planning, even if their researches cannot be given immediate effect. The outbreak of a war would be the signal for the formation of further international economic committees with great executive authority, similar to those from which many of the League Permanent Committees originated, and the problems of relief likely to

exist at the end of a war would necessitate their continuance.

The inducements immediate and ultimate which are driving the non-Totalitarian States of Europe towards a closer union are strong, and federation is the form of union which combines best the executive strength of a single whole with the retention of liberty by its national constituent parts. It is impossible here to do more than throw out a few ideas in the light of the historical data of preceding chapters about the probable nature of an International Federation, but it is hoped that the following notes may at least provoke the reader to disagreement and to the formulation of his own thoughts on the subject.

II

The nature of the International Federal Government would naturally be determined, like the Federal law, by a fixed constitution (see Section III below). Of the organs of government under an International Federal System, the legislature would be that in which the citizens of the constituent nations would be most directly interested. If it were to take the usual form of a House of Representatives and an Upper House, or Senate, it is probable that each House would be formed according to the strict Federal principle ; that is, the first would be elected directly, and its members would represent the different nations according to the weight of their

population, while the Senate would also probably be popularly elected rather than nominated, and contain an equal [1] number of representatives from each nation member of the Federation.

It is clear that no House of Representatives could adequately debate all the multifarious issues that would be likely to come before it. Government in National States is coming more and more under the hands of expert committees, and in an International State, whose problems would be as technical and more various, the rôle of standing committees in the House of Representatives would probably be very large, as it is in the American House of Representatives. It would be difficult to combine the ideal Federal principle of representing each country on each committee with that of proportional representation ; but the committees would have power to summon witnesses from all member States, and those not represented largely on it might be given a prior right of collecting evidence for it.

The problem of an Upper House—its composition and function—is always a difficult one constitutionally. If it is popularly elected and has large powers of veto, it can overshadow the lower house ; if not, its proceedings are apt to be ignored. The principle of State representation in the government of an International Federation is however important, and the institution of some kind of Upper House therefore valuable. The

[1] Streit suggests a slight modification of this : he allows four representatives in the Senate to France and to Great Britain, ten to the U.S.A., and two to the rest of the fifteen democracies he suggests as constituent members of the Union.

Constitution should provide for a type of Senate which has substantial powers of amendment (even in financial Bills) and perhaps of initiation, but which shall be subject by fairly frequent election to popular control, and where individual excellence rather than party loyalty shall determine as far as possible the result of the elections.[1]

The supreme international executive power would ideally be vested in a responsible Cabinet under a Prime Minister, rather than in a President with a Council of Ministers not responsible to Parliament and without direct means of initiating or putting through their own measures. On the other hand, it would be desirable to avoid too frequent changes of Ministry, because of the probable expense of Federal elections, if for no other reason.

The executive, like the Parliament, would have a large variety of subjects with which to deal, and would probably extend the scope and permanence of its power by the institution of permanent boards with delegated authority or advisory functions, such as the Loan Council and Tariff Board in Australia.

As regards an International Civil Service, a "spoils system," like that which ensures the American President a reasonable amount of control over Congress, is not desirable, but an experienced and permanent administrative body would be essential.

The formation of an International Army would

[1] It is not easy to secure frequent election and avoid party influence. *Cf.* the Australian Senate.

be among the first and most difficult tasks of the executive. In this field, it seems that an International Federation would differ most sharply from its national patterns. It is clear that particularly in border States of a Federal Union, the original armies of the constitutional States must very largely continue their function. It would for instance obviously be wasteful to replace the French garrisons of the Maginot Line by an international force. The function of a Federal Government in international defence would probably be chiefly economic—the allocation of raw materials useful for armaments, and the control of armament production in its constituent countries.

III

Into the problems of an International Judiciary there is no space to enter. There would necessarily be in each constituent nation one court, whether specially constituted or adapted from an existing institution, to administer Federal Law ; and there would necessarily be a Supreme Court of Appeal on points of Federal and International Law.

The Federal Law of an international union would have to be embodied in a fixed Constitution, like those of the National Federations which we have examined. The powers of Federal and National Governments could not otherwise be precisely delimited ; and in the case of an International Federation where there would be a

strong tradition of separatism among the constituent nations, the importance of a Constitution recognized as a supreme and binding law would be all the greater.

The existence of a Constitution implies the existence of an independent body [1] charged with the task of giving it its final and authoritative interpretation in case of need. But in the history of National Federation, the danger of abuse by the Supreme Courts of the interpretative power is very evident. In our International Federation there would be no power strictly comparable to that of the Judicial Committee of the Privy Council ; but the Federal Supreme Court would have very much the same kind of function in judging from afar disputes between different parties. It would incur very easily, as a Court of Appeal, one of the criticisms directed against the Privy Council, that it could not possibly have the means of judging a case better than the court nearer the place of its occurrence. The criticisms which have been hurled against the U.S.A. Supreme Court apply mainly to a misuse of certain general clauses of the U.S. Constitution, which need not be reproduced, or whose intention could be made clearer, in an International Federal Constitution. But possibly it would in any case be better to hand over appeal cases on industrial and social legislature to a special court, such as the Australian Commonwealth Conciliation and Arbitration Board, with powers to give

[1] In Switzerland the legislative itself has the power of interpreting its own enactments.

a general rule in specified cases.[1] Various other checks on the Supreme Court's decisions might be instituted. Some kind of popular vote on disputed decisions would probably be too cumbrous a process, and it would probably be difficult for the Supreme Court to give any previous interpretation of legislation before a definite case arose under it. But the Federal Parliament might be empowered to ask its opinion before passing any measure ; and some means might be found of making an arbitral award for parties between whom a case was likely to arise, and who agreed to bring it before the Federal judiciary.

One form of appeal is still possible against the Constitution and the decisions of its interpreter, the Supreme Court ; that is the appeal to the popular will, which may be given the power to amend the Constitution. It is clear that the too frequent use of this power would result in a legislative chaos, but it is desirable that the final appeal to the people, when made, should not have too complicated a form. The referendum, as applied in Australia, could hardly be extended over so wide a field ; amendments would probably have to be initiated by majorities in the Federal legislature, and passed by the national parliaments or by special constituent assemblies.

An International Federal Constitution would probably therefore be a supreme law, interpreted like National Federal Constitutions by a Supreme

[1] Again, very great precision and clarity would be required in the clauses specifying the powers of such a Court. *Cf.* the difficulties arising in Australia.

Court, and subject to amendment by some not too cumbrous process.

IV

It remains to make some suggestions about the probable contents of such a Constitution.

(i) As regards the constituent nations, it is clear that the Federal Constitution would not prescribe definite forms of government for them; but it is likely that the first constituents of any Federal Union would be democracies, and that some proviso would be inserted in the Federal Constitution that they and future constituent nations should have democratic forms of government. It would also be necessary, in a world divided sharply into groups of powers, to prevent any constituent State from being tempted into the opposing, probably Totalitarian, group; and therefore the Federal Constitution would probably contain a clause putting difficulties in the way of secession.

(ii) The relations of the Federal Government to its individual citizens would cause its ultimate success or failure. It is probable even that certain general guarantees would be given under the Constitution to ensure freedom of speech, freedom of the Press, and freedom of association, even if such clauses meant the restriction of original membership of the Union. Instead of the "property" clause of the U.S. Constitution might be inserted a guarantee of certain specific

workers' rights (it is important that no such guarantee should be too general in form, so as to avoid the difficulties arising from judicial interpretation). It is desirable too that the Federal Government should be given specific powers with regard to minorities, but again in language more precise than that of the education clause in the B.N.A. Act.

(iii) The general nature of any International Federal Constitution would already favour the constituent nations rather than the central government; that is, it would need to be modelled more on the Commonwealth of Australia Act or the U.S. Constitution than on the B.N.A. Act. Certain specific powers would be granted to the Central Government, the rest left to the constituent nations. The only restrictions to these residuary powers would be the guarantees which we have mentioned, and possibly a clause which would allow (but only after consultation, *e.g.* with national Premiers) the Federal Government to legislate for the "general welfare."

There are three plain reasons for leaving to the constituent nations the widest possible powers. First, that they would be unlikely to join the Union on any other terms; secondly, that the individual is thereby enabled to have the final say so far as possible in his own affairs; and, lastly, that the constituent nations of an International Union would have already far more widely developed social policies than the constituent States of

the National Federations we have considered, at the time when these Federations were formed.

The last point may be shortly developed. A central International Government might wish to ensure some kind of uniformity in, for instance, educational systems and social services. But it would find in most of the constituent nations highly developed and complicated organizations working in both fields, and would naturally achieve its ends chiefly by means of conditional grants to existing national institutions, not by sweeping new legislation. Again, the example of Australia, where Federation took place after the establishment of its modern economic system, is more relevant to the international planner than that of America or Canada.

V

Political difficulties would not be the greatest obstacle in the way of an International Federation. It is the renunciation of economic nationalism that will be the crux of the matter. Neither political nor economic difficulties will be insuperable when public opinion demands some kind of international union ; but the difficulties of transition from a national to an international economy are those which demand the most thorough planning while public opinion is being aroused.

It will be comparatively easy to convince the plain man of the ultimate economic benefits which he will derive from a Federal Union. Within such a union it would be possible to organize trade on an international basis. Tariff walls between the component nations would be broken down, and they would not be driven by the fear of war to aspire to an economic self-sufficiency which is wasteful from the consumer's point of view. Instead, materials would be freely interchanged, the resources of nations would be used in the most economical way, exchange rates would cease to fluctuate, production would increase, the cost of living decrease, wages and the standard of living would rise.

Such is the Utopian goal, and there can be no doubt that many would strive towards it who are content to let fools contest for forms of government. But the immediate resources of the Federal Government would be limited, and in extending them the problems of transition would be very great.

Thus the lowering or complete removal of tariff barriers within the Union would mean that the constituent nations would lose a large part of their national income. The Federal Government would not gain proportionately, since the Union would be largely self-supporting and would need far less imported materials from outside itself. National expenditure on defence would of course decrease, and the cost of living would eventually drop; but these would be gradual

processes, whereas the losses in national income would be immediate.

The same kind of reasoning applies to direct Federal taxation, and the raising of a Federal loan. It is hardly possible to imagine that national taxation would immediately drop very much, and the addition of a Federal income tax would not popularize the new government ; but the Federal Government would need money in order to carry through any kind of economic programme, and would raise it most readily by taxation.

The solution of these problems would probably have to be along the lines of the Australian " Braddon " clause ; the Federal Government would take over customs dues, where they were kept, and perhaps reserve to itself some fixed proportion of national taxes, on the condition that it made annual grants of determined amounts to the several nations. Similarly, a certain amount of national securities might be converted to Federal securities ; the Federal Government would risk increasing the interest to secure subscribers. Another major problem connected with the transition from national economic systems to an international economic plan would be the conciliation and compensation of the numerous professional and business interests affected by the change. To take a comparatively simple problem of professional interests, the Federal Government would work so far as possible through existing national customs officers, but would have to be prepared to find other

work or compensation for a great many of them. Similarly, the variety of coinage and the fluctuation of currency at present gives employment to many experts; it is not likely that a Federal coinage would immediately replace all national varieties, and the task of stabilizing exchange within the Union would take time. But it is to be hoped at least that such expert work would gradually disappear.

Much more important are the industries and businesses which would need to be compensated or turned into other channels when a Federal Government embarked on any international scheme for employing the economic resources, primary and industrial, of its constituent nations in the least wasteful way. It is to be hoped, for example, that the huge armament factories in each country would no longer be so necessary under the Union; the most hopeful way of forestalling the problems which would be created by their disuse, would be to divert heavy industry so far as possible to constructive purposes, such as the development of public works in colonial or backward areas.

Again it is to be hoped that under the Union, uneconomic efforts towards national self-sufficiency would be unnecessary. In many countries, for instance, agriculture is encouraged by bounties and import quotas, when it would be far cheaper for the consumer to buy the agricultural products of the larger producing countries. Given reasonable security from war, the *raison d'être* of the effort towards self-sufficiency

would be largely destroyed. But this would not be the view of the farmer who had been induced by bounties and quotas to put more land under cultivation, and saw his market and livelihood taken away from him.[1] The same arguments would apply to industries which had flourished under tariff protection. It seems that the removal of such protection would have to be gradual, and that in the meantime comprehensive schemes would have to be worked out for the diversion or specialization of industries which would cease to promote the general welfare of the Union, or to provide useful material for exports.

For the allocation of industries within the Union and the planning of public works programmes, it is probable that the Federal Government would have to institute permanent committees representing the interests of employers and workers, as well as of National Governments —that is, on the lines of the International Labour Organization—and acting, if possible, independently of the National and Federal Governments.

Such are the broadest outlines of the problems, economic and political, which would face the central government of an International Federation. It is well to bear the difficulties in mind, but not without the hope that they can be solved, and the faith that they will be solved, provided that a sufficient number of people can be

[1] There are also powerful arguments of a less materialistic nature against wholesale reorganisation on a purely economic basis. The traditions of the people affected, both technical and moral, must be taken into account.

stimulated to consider them. At present, the society " Federal Union " [1] is enlisting experts in many fields who will work at these basic problems and whose efforts will be the groundwork for their solution.

This book has dealt with the problems of Federal Government chiefly from the point of view of the Central Government. The authors have not the learning nor the time to produce what would have been a far more important book, dealing with the position of the individual under Federal systems. But the Federal system of government operates on the individual—that is its essential nature—and it is only by the efforts of individuals that any sort of international union could eventually take place. It is therefore of the utmost importance to try to visualize what the relations of an individual citizen would be to the government of a Federal Union, and it is with a few observations on this subject that our book will close.

With the ultimate aims of a Federal Union, the increase of security, and the rational use of its economic resources for the welfare of its constituent nations, every one must sympathize. But after a first rush of enthusiasm the average man may well pause, and pause for a long time, to count the costs of transition from a National to an International system. It is the task of the firm

[1] Their address is 44 Gordon Square, London, W.C.1. Voluntary assistance of any nature is particularly welcome to them; but it should be pointed out that the authors, though in sympathy with the general aims of the Society, would not wish to attribute to it the exact views expressed in this book.

believer in Federalism to convince public opinion that these costs are merely transitional, that the period of transition need not be long, and that the gains are out of proportion greater than the difficulties. First it must be emphasized that in many ways of ordinary life the average man would notice little change, except for the absence of a sense of insecurity which has of late become part of his normal consciousness. He would hardly be aware of a dominant super-State imposing its will upon him.

The schools, for instance, at which his children were educated might be able to offer more scholarships, and they might give a wider choice of possibilities in technical education owing to Federal grants, but these schools would still be national. Local police and law courts would be the concern of the nation, and it is probable that national armies would continue to exist. England as a member of the Union, would continue to enjoy its peculiar licence laws, though with the lessening of import duties a glass of wine need no longer be only a luxury; a holiday abroad could be undertaken more cheaply, without too many uncomfortable thoughts about passports and exchange regulations.

There would be additional burdens, of which the heaviest would probably be the payment of two income taxes, for nation and Federal State. But the claims of the nation would grow progressively lighter as the burden of defence was eased from it, and the cost of living should grow gradually less, as primary production

was rationalized and materials were freely exchanged.

National politics should not become more unimportant. Under the Federal Union they should be more strictly confined to their proper sphere, that of intra-national government ; but within this sphere, men will be able to embark more easily on the adventure of a constructive policy, an adventure which should soon prove as attractive as that of modern deromanticized war. The co-operation between nations in the matter of capital and material loans, which might be arranged by means of a Federal agency, would further enlarge the scope of a national government.

For the individual citizen of ability the institution of a Federal Government would open a wide choice of new careers in the new civil service that would have to be formed, and there is no doubt that for the formulation of its plans, the new government should welcome all the brains which it could recruit. The man who desires no more than security and decent working conditions would find them under the Union, and the ambitious man would be given a wider field in which to satisfy his ambitions.

It is on public opinion that the success of a new movement towards international organization depends. As these lines are written, it looks as if new and final proof would soon be given, were further proof needed, of the ghastly results of an international anarchy. In time of war, the average man can have little time to ponder these

things ; but a war must end, and another opportunity perhaps will be given to construct some kind of world-order. It is against that time, so it now appears, that this book has been written. If it serves only to show up to clearer minds the difficulties of a Federal solution, it will have achieved something ; if it awakens others to think internationally, it has achieved more.

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